

DEC 9 1982

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CITY DISPOSAL SYSTEMS, INC.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT**

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QUESTION PRESENTED

Whether the Board properly concluded that an individual employee's honest and reasonable assertion of a right that is provided for in a collective bargaining agreement is concerted activity protected by Section 7 of the National Labor Relations Act, 29 U.S.C. 157.

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No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CITY DISPOSAL SYSTEMS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-5a) is not reported. The decision and order of the National Labor Relations Board (App. C, *infra*, 8a-21a) are reported at 256 N.L.R.B. 451.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 6a) was entered on July 22, 1982. On October 12, 1982, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including November 19, 1982. On November 9, 1982, Justice O'Connor further extended the time for filing a petition for a writ of certiorari to and including December 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in pertinent part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] * * *.

STATEMENT

1. Respondent hauls garbage for the City of Detroit using tractor-trailers that take the garbage from the city to a land fill about 37 miles away (App. A, *infra*, 2a). Respondent employs numerous drivers who operate the trucks. The general policy is to assign each driver to a particular truck, unless that truck is in need of repair (*ibid.*).

James Brown had been employed by respondent as a truck driver since November 3, 1975 (App. C, *infra*, 10a-11a). Brown's routine assignment was to operate a tractor-trailer unit designated truck number 245. On Saturday, May 12, 1979, as Brown was preparing to dump a load of refuse at the landfill, he noticed that Frank Hamilton, another driver for respondent, was having difficulty stopping his truck, which was designated as number 244 (*ibid.*). After Hamilton finally stopped, Brown asked what the trouble was, and Hamilton explained that the brakes were not working (*ibid.*). Brown and Hamilton then returned to re-

spondent's truck repair facility, where Hamilton spoke with mechanic Francis Castelono about truck 244's brake problem. Castelono and mechanic David Ammerman told Hamilton that they would fix it over the weekend or perhaps on Monday morning (*id.* at 2a, 12a).

Early in the morning on Monday, May 14, while transporting a load of refuse, Brown experienced difficulty with one of the wheels on truck 245 and returned it for repair. He reported the problem to mechanic Ammerman. Ammerman told Brown that he would be unable to fix the truck that day because of the backlog of trucks in need of repair and advised Brown to go home or see his supervisor about using another truck (App. C, *infra*, 12a). Brown then reported to his supervisor, Otto Jasmund, who, after checking out Brown's report about truck 245, advised Brown that he should punch out and go home (*id.* at 13a).

Before Brown left the premises, however, Jasmund asked him to remain and drive truck 244 (App. C, *infra*, 13a). Brown declined, explaining that "there's something wrong with that truck" (*ibid.*). Brown further explained that "something was wrong with the brakes * * * there was a grease seal or something leaking causing it to be effecting the brakes" (*ibid.*). Jasmund angrily told Brown to go home, which led to an argument between them.

Supervisor Robert Madary intervened and asked Brown to drive truck 244. Brown again refused, explaining to Madary that the truck "has got problems and I don't want to drive it" (App. C, *infra*, 13a). Madary replied that "half [the trucks around here] 'have problems'" and that if respondent tried to deal with all of them it would be unable to do business (*id.* at 13a-14a). During the conversation, Brown asked, "Bob, what you going to do, put the garbage ahead of the safety of the men?" *Id.* at 14a. Madary did not re-

ply, nor did he or Jasmund make any attempt to show Brown that the truck was safe (*id.* at 20a). Instead, they allowed Brown to go home (*id.* at 15a). Later that day, Brown was discharged (*ibid.*).¹

On May 15, the day after his discharge, Brown filed a written grievance, asserting that he had been improperly ordered to drive truck 244 (App. C, *infra*, 15a). Citing Article XXI, Section 4 of the collective bargaining agreement between respondent and Local 247 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, which represented respondent's drivers,² Brown stated that "Truck

¹ John Calandra, the Union's recording secretary, received notice that respondent had discharged Brown and then notified Brown. That afternoon Calandra and Brown went to respondent's facility where they met with supervisors Jasmund and Madary. The supervisors refused to reinstate Brown (App. C, *infra*, 14a-15a).

Respondent's disciplinary form stated that Brown had "violated the following company rule * * * Disobeying of orders (Refusal to drive #244)" (C.A. App. A195), and added that Brown had "voluntarily quit" (App. C, *infra*, 15a). The administrative law judge (ALJ) in this case, however, expressly found that Brown had been discharged (*id.* at 17a). "C.A. App." refers to the appendix filed in the court of appeals. "R. Ex." refers to the exhibits submitted to the ALJ by respondent.

² Article XXI of the Agreement provided, in pertinent part, (App. C, *infra*, 11a; C.A. App. A202-A203):

Section 1.

The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with the safety appliances prescribed by law. It shall not be a violation of the Agreement where employees refuse to operate such equipment unless such refusal is unjustified.

Section 4.

The Employer shall not ask or require any employee to take out equipment that has been reported by any other employee as being in an unsafe operating condition until same has been approved as being safe by the mechanical department.

#244 was reported by the regular driver as being defective * * * and had not been repaired" (R. Ex. 4). The Union declined to pursue Brown's grievance beyond the initial stages of the grievance procedure (App. C, *infra*, 15a).

2. On September 7, 1979, Brown filed an unfair labor practice charge with the National Labor Relations Board (App. C, *infra*, 15a). Upholding the decision of the administrative law judge (ALJ), the Board concluded that respondent violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging Brown (App. C, *infra*, 7a).

The ALJ found that Brown had not voluntarily quit his job, as respondent had contended, but rather, that he was discharged for refusing to operate truck 244 (App. C, *infra*, 17a). The ALJ further held that Brown's refusal was protected by Section 7 of the Act, 29 U.S.C. 157. Based on prior decisions of the Board, the ALJ reasoned that

when an employee makes complaints concerning safety matters which are embodied in a contract, he is acting not only in his own interest, but is attempting to enforce such contract provisions in the interest of all the employees covered under that contract. Such activity we have found to be concerted and protected under the Act, and the discharge of an individual for engaging in such activity to be in violation of Section 8(a)(1).

(App. C, *infra*, 18a, quoting *Roadway Express, Inc.*, 217 N.L.R.B. 278, 279 (1975); footnotes omitted). Applying this reasoning to Brown's situation, the ALJ found that Brown was asserting a right clearly provided for in the collective bargaining agreement, and that the assertion was based on an honest belief that the brakes on truck 244 were inadequate (App. C, *infra*,

21a).³ Accordingly, he concluded that respondent violated Section 8(a)(1) by discharging Brown.

In adopting the ALJ's decision, the Board noted that the Court of Appeals for the Sixth Circuit had disagreed with the Board in similar circumstances in *ARO, Inc. v. NLRB*, 596 F.2d 713 (1979), but nonetheless adhered to its position that activity such as Brown's, although performed singly, is "concerted activit[y]" within the meaning of Section 7 of the Act (App. C, *infra*, 7a n.3). The Board ordered Brown reinstated with back pay.

3. The court of appeals denied enforcement of the Board's order (App. A, *infra*, 1a-5a). Adhering to its previous decision in *ARO, Inc. v. NLRB*, *supra*, the court held:

For an individual claim or complaint to amount to concerted action under the Act it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action and have some arguable basis in the collective bargaining agreement.

(App. A, *infra*, 4a, quoting from *ARO, Inc. v. NLRB*, *supra*, 596 F.2d at 718). Applying that test, the court of appeals found that Brown's action in refusing to drive truck 244 was not concerted because "[t]here is no evidence in the record that Brown acted or asserted an interest on behalf of anyone other than himself. Brown did not attempt to warn other employees not to drive

³ The ALJ found it immaterial that "another driver subsequently drove truck 244 without incident or that Respondent's record[s] show that truck 244 may have been in good repair * * *" (App. C, *infra*, 19a). "Operation of the Board's policy as set forth in *Roadway Express* is not dependent on the merits of the asserted contract claim" but only on whether "the claimed belief [is] 'honestly held'" (App. C, *infra*, 18a-19a).

the truck he believed to be unsafe * * *. Likewise, Brown did not go to his union representative in an effort to avoid driving the truck he considered unsafe" (App. A, *infra*, 4a).⁴

REASONS FOR GRANTING THE PETITION

The question whether an employee's honest and reasonable assertion of a right guaranteed by a collective bargaining agreement is protected by Section 7 is an important and recurring one in the administration of the Act. The decision of the Sixth Circuit that such conduct is not protected concerted activity is squarely in conflict with the decisions of at least two other courts of appeals and may conflict with others. In addition, the decisions of those courts of appeals that have refused to accept the Board's interpretation are based exclusively on an unduly literal reading of the statute without reference to the policies of the Act and without regard to the Board's expertise in interpreting the Act. Those decisions are thus contrary to numerous holdings of this Court requiring deference to the Board's interpretation of the requirements of the National Labor Relations Act.

1. Section 7 of the Act, 29 U.S.C. 157, guarantees to employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." Interpreting this language, the Board has long held that an individual's assertion of a right embodied

⁴ The court acknowledged that Brown did make a comment to his supervisor regarding the safety of all of respondent's drivers, but held that this single, isolated statement had not been expressly relied upon by the Board, and, in any event, was not "substantial evidence" of concertedness (Pet. App. A, *infra*, 4a).

in a collective bargaining agreement is concerted activity within the meaning of Section 7, because the individual's efforts "affect the rights of all employees in the unit * * *." *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, 1298 (1966), enf'd, 388 F.2d 495 (2d Cir. 1967). See also *T&T Industries, Inc.*, 235 N.L.R.B. 517 (1978); *John Sexton & Co.*, 217 N.L.R.B. 80 (1975); *Chas. Ind. Co.*, 203 N.L.R.B. 476 (1973); *H.C. Smith Construction Co.*, 174 N.L.R.B. 1173 (1969). As the Board further explained in *ARO, Inc.*, 227 N.L.R.B. 243, 244 (1976), enforcement denied, 596 F.2d 713 (6th Cir. 1979), "[i]ndividual complaints of this sort are similar to grievances, and since they will have an effect on all employees, * * * such conduct is protected by the Act."

The Second Circuit has accepted the Board's interpretation of concerted activity. In *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 500 (1967), the court stated in an alternative holding that "activities involving attempts to enforce the provisions of a collective bargaining agreement may be deemed to be for concerted purposes even in the absence of such interest by fellow employees." See also *NLRB v. John Lagenbacher Co.*, 398 F.2d 459, 463 (2d Cir. 1968), cert. denied, 393 U.S. 1049 (1969).⁵ The Seventh Circuit, in *NLRB v. Ben Pekin Corp.*, 452 F.2d 205, 206 (1971), expressly adopted the reasoning of the Second Circuit in *Interboro* on this issue. See also *NLRB v. Town & Country*

⁵ In *Ontario Knife Co. v. NLRB*, 637 F.2d 840 (1980), the Second Circuit declined to extend the *Interboro* doctrine to situations where there is no collective bargaining agreement. See *Alleluia Cushion Co.*, 221 N.L.R.B. 999, 1000 (1975); Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. Pa. L. Rev. 286, 303-310 (1981). The court took pains, however, to reaffirm the continuing vitality of the *Interboro* doctrine in that circuit in "situations in which an individual employee is attempting to enforce a collective bargaining agreement which is itself the result of concerted activity" (637 F.2d at 845).

LP Gas Service Co., 687 F.2d 187, 191-192 (7th Cir. 1982); *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23, 29 (7th Cir. 1980); *NLRB v. Selwyn Shoe Manufacturing Corp.*, 428 F.2d 217, 221 (8th Cir. 1970).⁶

The *Interboro* doctrine of concerted activity, however, has hardly received a hospitable reception in all courts of appeals. The Third, Fifth, and Sixth Circuits have directly repudiated the Board's reasoning underlying the *Interboro* doctrine. *NLRB v. Northern Metal Co.*, 440 F.2d 881, 884 (3d Cir. 1971); *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 719 (5th Cir. 1973)⁷ *ARO, Inc. v. NLRB*, 596 F.2d 713, 716-717 (6th Cir. 1979).⁸ Thus, in *ARO, Inc.*, *supra*, the Sixth Circuit, acknowledging the division among the courts of

⁶ In *Roadway Express, Inc. v. NLRB*, 532 F.2d 751 (4th Cir. 1976), the court in a per curiam opinion enforced a Board order based on facts similar to those here (see 217 N.L.R.B. 278 (1975)). But see *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304 (4th Cir. 1980); *Blaw-Knox Foundry & Mill Machinery Inc. v. NLRB*, 646 F.2d 113 (4th Cir. 1981).

⁷ The Fifth Circuit's disapproval of the Board's *Interboro* doctrine in *NLRB v. Buddies Supermarkets, Inc.*, *supra*, was dictum since the court found that the employee's claim was not based on a collective agreement. See *Anchortank, Inc. v. NLRB*, 618 F.2d 1153, 1161 n.10 (5th Cir. 1980), suggesting that *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), supports the Board's theory. Compare *NLRB v. Datapoint Corp.*, 642 F.2d 123, 129 (5th Cir. 1981).

⁸ In *NLRB v. C&I Air Conditioning, Inc.*, 486 F.2d 977, 978-979 (1973), the Ninth Circuit, while expressing no opinion directly on the validity of the *Interboro* doctrine, refused to apply it to a situation where there was no evidence "that the purpose of [the employee's] conduct was for the 'mutual aid and protection' of other employees, or that it was an attempt to enforce the provisions of a mutual bargaining agreement."

The D.C. Circuit also declined to approve application of the Board's *Interboro* decision to a situation where the employee withdrew his grievance and therefore did not attempt to pursue it through the contractually established procedure. *Kohls v. NLRB*, 629 F.2d 173, 177 (D.C. Cir. 1980).

appeals on this issue, agreed with "the decisions of [those courts] which have rejected the *Interboro* doctrine" (596 F.2d at 717). See also *Kohls v. NLRB*, 629 F.2d 173, 176-177 (D.C. Cir. 1980), cert. denied, 450 U.S. 931 (1981) (discussing the split in the circuits). This conflict among the circuits on a recurring issue under the Act that affects the day-to-day activities of employees and employers clearly warrants resolution by this Court.

2. Moreover, the decisions of the courts of appeals, including the decision below, which have rejected the Board's *Interboro* doctrine are based solely on a wooden reading of the statute. Those courts have consistently refused, contrary to numerous decisions of this Court, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978); *NLRB v. Iron Workers*, 434 U.S. 335, 350 (1978); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260-262 (1975); *NLRB v. Servette, Inc.*, 377 U.S. 46, 55-56 (1964); *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 499 (1960), to accord any deference to the Board's consistent interpretation of Section 7 based on the policies of the Act.

Those courts of appeals have seized upon the dictionary definition of the term "concerted" and concluded that protected activity must include in some fashion at least two employees. See *NLRB v. Northern Metal Co.*, 440 F.2d 881, 884 (3d Cir. 1971). See also *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 306 & n.3 (4th Cir. 1980); *Kohls v. NLRB*, 629 F.2d 173, 176 (D.C. Cir. 1980). Exclusive reliance on a dictionary as the basis for interpreting Section 7, however, is questionable at best. First, the aims of the National Labor Relations Act often cannot be effectively accomplished by reading the statute literally. See, e.g., *NLRB v. Servette, Inc.*, 377 U.S. 46, 55 (1964). See generally Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*,

130 U. Pa. L. Rev. 286, 329-331 (1981). Second, Section 7, by its terms, protects any employee engaging in "concerted activity," it is not limited to protecting employees acting in concert and thus its language does not preclude protection for an employee acting alone. Indeed, this Court has acknowledged that Section 7 applies "even though the employee alone may have an immediate stake in the outcome * * *." See *NLRB v. J. Weingarten, Inc.*, *supra*, 420 U.S. at 260. See also *Anchortank, Inc. v. NLRB*, 618 F.2d 1153, 1161 n.10 (5th Cir. 1980); Note, *Individual Rights for Organized and Unorganized Employees Under the National Labor Relations Act*, 58 Tex. L. Rev. 991, 998 (1980).

Third, the Board's interpretation still requires the existence of concerted activity and thus does no violence to the plain meaning of the statute. The Board has never held that Section 7 protects a purely personal gripe by an individual employee.⁹ It is in no way inconsistent with the statutory language to accord Section 7 protection to efforts by an individual employee to assert rights which, through collective bargaining, have been secured for all the employees in the bargaining unit. If an employee successfully pursues his claim, establishment of the claimed right will benefit all the bargaining unit employees; conversely, if he is unsuccessful, the adverse precedent is likely to diminish the protection under the agreement accorded other employees. Moreover, individual action seeking to implement the terms of a collective bargaining agreement is merely an extension of the concerted activity which gave rise to the

⁹ See *Ryder Tank Lines, Inc.*, 135 N.L.R.B. 936, 938 (1962), enforcement denied on other grounds, 310 F.2d 233 (4th Cir. 1962); *Tabernacle Community Hospital & Health Center*, 233 N.L.R.B. 1425, 1429 (1977).

agreement in the first place.¹⁰ As this Court stated in *Smith v. Evening News Association*, 371 U.S. 195, 200 (1962):

The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based * * *.

Indeed, it is the limited construction of Section 7 imposed by the Sixth and other circuits that gives rise to anomalous results under the statute. Under the court of appeals' view, an individual employee's activity is deemed concerted under the Act only when "made on behalf of other employees or at least * * * made with the object of inducing or preparing for group action and hav[ing] some arguable basis in the collective bargaining agreement." *ARO, Inc. v. NLRB*, *supra*, 596 F.2d at 718.¹¹ Thus, if employee Brown had had a helper on

¹⁰ In the Board's view, the employee need not expressly rely on the contract, where the ground for the employee's complaint is a matter clearly covered by the contract. See *John Sexton & Co.*, 217 N.L.R.B. 80 (1975); *Roadway Express, Inc.*, 217 N.L.R.B. 278, 279 (1975), *enfd.*, 532 F.2d 751 (4th Cir. 1976). Thus, here, since employee Brown complained about truck safety, a subject specifically governed by the collective agreement, the Company was put on notice that the safety provision of the agreement was implicated—a fact which was confirmed when Brown later filed his grievance specifically referring to Article XXI of the agreement (pages 4–5, *supra*).

¹¹ In *McLean Trucking Co. v. NLRB*, 689 F.2d 605, 609 (6th Cir. 1982), the court, while adhering to its position in this case, explained that, "in evaluating the nature of * * * individual action, * * * the following factors are relevant to the issue of concertedness: (1) the substance of the employee's activity—did he act alone, without union advice or did he seek to involve and

his truck, his refusal to drive the truck for safety reasons would have been concerted. Similarly, even if Brown had been the sole occupant of the truck, his refusal would have been concerted if it could be shown either that he had previously discussed the safety problem with one or more fellow employees or that he was on the verge of doing so.¹² Making the protection of Section 7 turn on these fortuitous circumstances effectuates neither the policies of the Act, nor the legislative purpose in adopting Section 7.¹³

An individual employee who asserts a right negotiated by his bargaining agent is as much in need of statutory protection as a group of employees who are

inform other employees; (2) the degree of union involvement in and concern with the dispute—was a grievance filed, were union officials notified; (3) the subject of the complaint—did it have at least an arguable basis in the collective bargaining agreement or was it merely a personal dispute." Applying these criteria, the court found that the refusal of two employees to drive trucks which they reasonably believed were unsafe was concerted activity protected by Section 7 of the Act, because they had first checked with union representatives and had been advised that, under the collective bargaining agreement, they were not required to drive the trucks without receiving documentation that they had been repaired and were safe to operate (689 F.2d at 610).

¹² See *Bay-Wood Industries, Inc. v. NLRB*, 666 F.2d 1011, 1012 (6th Cir. 1981); *NLRB v. Coca-Cola Co.*, 670 F.2d 84 (7th Cir. 1982); *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

¹³ The term "concerted" was included in Section 7 to make clear that activities lawfully engaged in by an individual could not be treated "as an illegal conspiracy merely because they are undertaken by many persons acting in concert." *Automobile Workers v. Wisconsin Board*, 336 U.S. 245, 258 (1949) (footnote omitted). See also Gorman & Finkin, *supra*, 130 U. Pa. L. Rev. at 331-346. This purpose obviously indicates nothing about how to deal with individual action covered by the collective bargaining agreement that will necessarily affect other employees.

discharged for the same reason, or as one employee who is discharged while on the verge of soliciting group support. The Board's *Interboro* doctrine thus is a permissible interpretation of the statute and the court of appeals' refusal to uphold it, which conflicts with decisions of the Second and Seventh Circuits, warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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National Labor Relations Board

DECEMBER 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 81-1406

CITY DISPOSAL SYSTEMS, INC., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

ON PETITION for Review and cross-application for
enforcement of an order to
the National Labor Relations Board.

Decided and Filed July 22, 1982

Before: LIVELY and JONES, *Circuit Judges*, and
CECIL, *Senior Circuit Judge*.

PER CURIAM. Petitioner seeks review and the National Labor Relations Board seeks enforcement of an order holding that City Disposal Systems, Inc. (the Company) violated Section 8(a)(1) of the National Labor Relations Act by discharging its former employee, James Brown, in disregard of his Section 7 rights.¹

¹ Section 8(a)(1) provides:

It shall be an unfair labor practice for an employer—
(1) to interfere with, restrain, or coerce employees in the
exercise of the rights guaranteed in section [7].

Section 7 provides in part:

Employees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

29 U.S.C. §§ 157 & 158 (1976).

The Board's order relied upon the *Interboro* doctrine,² although it noted that this Circuit has rejected the doctrine. *City Disposal Systems, Inc.*, 256 N.L.R.B. No. 73 (June 9, 1981). We grant the petition for review and deny enforcement.

City Disposal Systems hauls garbage for the City of Detroit from a drop-off point to a land fill some 37 miles away. The garbage is hauled by tractor-trailers. Normally a driver is assigned to a certain tractor-trailer; however, when this vehicle is in for repairs, the driver may be reassigned to another vehicle.

James Brown was a driver for the Company. He normally drove truck number 245. On May 12, 1979, Brown had a near accident with truck number 244 driven by Frank Hamilton when the brakes on 244 would not stop the truck at the land fill. Hamilton took 244 back to the drop-off point. With Brown present, mechanics told Hamilton that the truck would be fixed over the weekend or the first thing Monday morning. Brown's truck, 245, also had a problem with its fifth wheel which was to be fixed by Sunday.

Brown returned to work at 4:00 a.m. Monday, May 14. He took his truck out to the land fill and found that the fifth wheel continued to cause problems. Brown returned to the drop-off point, talked to the mechanics, and learned that his truck could not be fixed that day. He then spoke to a supervisor, Jasmund, who told him to punch out and go home after confirming that his truck would not be fixed. Brown punched out but remained in the driver's room. Jasmund returned and requested Brown to drive number 244. Brown said he would not do so since 244 had a brake problem. Jasmund instructed Brown to go home and the two had words. Another supervisor, Bob Madary, came on the scene. When Brown repeated that 244 had problems,

² See *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), *enfd.*, 388 F.2d 495 (2d Cir. 1967).

Madary pointed out that all the trucks had problems and if the Company dealt with them all it would be unable to move the garbage. Brown testified that he replied, "Bob, what you going to do, put the garbage ahead of the safety of the men?" Madary was unmoved. Brown left work. Later he was notified that the Company had listed him as a voluntary quit.

Subsequently Brown, a member of Local 247, International Brotherhood of Teamsters, Changers, Warehousemen and Helpers (the Union), filed a grievance seeking reinstatement and citing provisions in the collective bargaining agreement giving employees the right to refuse to operate unsafe equipment. The Union found little merit in his grievance and refused to process the grievance beyond the early stages of the contractual grievance procedure.

The *Interboro* doctrine, as we understand it, holds that an individual enforcing rights under the labor contract is engaged in concerted activity protected by Section 7 even though he is acting solely for his own purposes since the labor contract itself is the product of concerted activity and the action of the employee is an extension of that process. *Aro, Inc. v. NLRB*, 596 F.2d 713, 716 (6th Cir. 1979); *See NLRB v. Selwyn Shoe Mfg. Corp.*, 428 F.2d 217, 221 (8th Cir. 1970); *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295 (1966), *enfd.*, 388 F.2d 495 (2d Cir. 1967).

Courts have recognized tension between the *Interboro* doctrine and the plain language of Section 7. *See, e.g., Kohls v. NLRB*, 629 F.2d 173, 177 (D.C. Cir. 1980), *cert denied*, 450 U.C. 931 (1981); *NLRB v. Northern Metals Co.*, 440 F.2d 881, 884 (3rd, Cir. 1971). Section 7 requires that the employee engage in "concerted activities." An individual does not act in concert with himself. To test whether an action is concerted, we adhere to the criteria set forth by Judge Phillips in *Aro, Inc.*:

For an individual claim or complaint to amount to concerted action under the Act it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action and have some arguable basis in the collective bargaining agreement.

596 F.2d at 718; see *NLRB v. Lloyd A. Fry Roofing Co.*, 651 F.2d 442, 445 (6th Cir. 1981).

There is no evidence in the record that Brown acted or asserted an interest on behalf of anyone other than himself. Brown did not attempt to warn other employees not to drive the truck he believed to be unsafe, even though the evidence established that there was a bulletin board on which employees informed their co-workers of problems with equipment. Likewise, Brown did not go to his union representative in an effort to avoid driving the truck he considered unsafe. While Brown's isolated comment alluded to the safety of all the men, it was not relied on by the Board to evidence concerted action. In view of the vague and general nature of the comment, and the absence of evidence that Brown informed other drivers or his union that number 244 was unsafe, we do not accept the comment as substantial evidence of concertedness. Compare *NLRB v. Lloyd A. Fry Roofing Co.*, *supra*, and *NLRB v. Guernsey-Muskingum Electric Co-operative, Inc.*, 285 F.2d 8 (6th Cir. 1960) with *Bay-Wood Industries, Inc. v. NLRB*, 666 F.2d 1011 (6th Cir. 1981); *United Parcel Services v. NLRB*, 654 F.2d 12 (6th Cir. 1981) and *Aro, Inc. v. NLRB*, *supra*.

The union made no effort to protest the use of the truck. Pursuit of Brown's claim that he was discharged in violation of the labor agreement by the Union is to be distinguished from union activities with respect to the equipment Brown believed to be unsafe. The discharge claim asserts a different interest at a later time. It

neither tends to prove nor disprove that when Brown complained he was seeking to represent the Union or other individual employees.

The District of Columbia Circuit relied upon similar facts to those present here in finding that an employee's actions could not reasonably be perceived as concerted in *Kohls v. NLRB*, 629 F.2d at 177. We are in complete agreement with the analysis therein expressed by Judge Edwards as to this issue.

Having found no substantial evidence that the employee's actions were concerted within the meaning of Section 7, we need not address the other arguments raised by the Company.

Accordingly, the Company's petition for review is GRANTED and the Board's cross-petition for enforcement is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 81-1406

CITY DISPOSAL SYSTEMS, INC., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

Filed July 22, 1982

JUDGMENT ENTRY

Before: LIVELY and JONES, *Circuit Judges*, and
CECIL, *Senior Circuit Judge*.

On petition for review and cross-application for enforcement of an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of proceedings from the National Labor Relations Board and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the Company's petition for review is granted and the Board's cross-petition for enforcement is denied.

It is further ordered that Petitioner recover from Respondent the costs on appeal as itemized below.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, Clerk

/s/ John P. Hehman,

Clerk

ISSUED AS MANDATE: AUGUST 13, 1982

COSTS: Petitioner to recover costs . . . \$460.40

Printing of brief

APPENDIX C
NATIONAL LABOR RELATIONS BOARD
CITY DISPOSAL SYSTEMS, INC. and JAMES BROWN.
Case 7-CA-16792

June 9, 1981

DECISION AND ORDER

On January 15, 1981, Administrative Law Judge Leonard M. Wagman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The Board has considered the record and the attached Decision in light of the exceptions and brief¹ and has decided to affirm the rulings, findings,² and conclusions³ of the Administrative Law Judge and to adopt his recommended Order.⁴

¹ Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

² Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

³ We agree with the Administrative Law Judge's conclusion that Brown's refusal to drive a vehicle which he honestly believed to be unsafe constituted concerted protected activity. Although the Court of Appeals for the Sixth Circuit disagreed with the Board in similar circumstances in *Aro, Inc. v. N.L.R.B.*, 596 F.2d 713 (1979), denying enforcement to 227 NLRB 243 (1976), we respectfully decline to follow the Sixth Circuit's opinion, and we shall continue to adhere to our decision in that case until such time as the Supreme Court may determine the issue.

⁴ Member Jenkins would provide interest on the backpay award in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, City Disposal Systems, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached order is substituted for that of the Administrative Law Judge.⁵

APPENDIX**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE****NATIONAL LABOR RELATIONS BOARD**

An Agency of the United States Government

WE WILL NOT discharge or otherwise discipline employees for refusing to drive vehicles which they honestly believe to be unsafe to operate, a right afforded them under the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in exercising their rights under the National Labor Relations Act.

WE WILL offer James Brown immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed, and **WE WILL** make him whole for any loss of earnings since his discharge on May 14, 1979, with interest.

CITY DISPOSAL SYSTEMS, INC.

⁵ We have substituted a new notice which contains language conforming to par. 1(a) of the Administrative Law Judge's recommended Order.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge: Upon a charge filed by James Brown, an Individual; the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued the complaint herein on October 19, 1979,¹ alleging that Respondent, City Disposal Systems, Inc., had violated Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C., § 151, *et seq.*, herein called the Act, by discharging employee James Brown because he exercised his right under Section 7 of the Act² and the collective-bargaining agreement between Respondent and Local 247, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America to operate a truck which he honestly believed to be unsafe. I heard this case at Detroit, Michigan, on April 11, 16, 17, 1980. Respondent, by its answer to the complaint, denied the commission of the alleged unfair labor practice. For the reasons stated hereafter, I find, in agreement with the General Counsel, that Respondent violated Section 8(a)(1) of the Act, as alleged.

Upon the entire record, and from my observation of the witnesses as they testified, and after consideration of the briefs filed by Respondent and counsel for the General Counsel, I make the following:

¹ Unless otherwise stated, all dates refer to 1979.

² In pertinent part, Sec. 7 of the Act provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

At all times material to this case, Respondent City Disposal Systems, Inc., a Michigan corporation, with its only office and place of business situated in Detroit, Michigan, has been engaged in the hauling and disposal of waste and rubbish. During the calendar year 1978, Respondent, in the course and conduct of its business operations, enjoyed gross revenues in excess of \$500,000 and provided rubbish removal services valued in excess of \$50,000 for the city of Detroit, which annually purchases goods valued at more than \$100,000, of which goods valued in excess of \$50,000 are shipped to it directly from points outside the State of Michigan. Respondent concedes, and I find from the foregoing data, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Facts*

At the time of his discharge on May 14, truckdriver James Brown³ had been in Respondent's employ since

³ Respondent sought to impeach Brown's credibility by introducing evidence of his conviction on April 30, 1970, of the crime of uttering and publishing for which he was sentenced to incarceration for 2½ to 14 years. As this conviction involved dishonesty and occurred less than 10 years prior to this hearing, I received the proffered evidence under Rule 609(a) and (b) of the Rules and Evidence for United States Courts and Magistrates. In light of that conviction and his evasiveness during cross-examination, I find Brown to be an unreliable witness. Accordingly, I credited his material testimony only to the extent it was corroborated in significant respects and by the circumstances generally. *Phillips Industrial Components, Inc., a wholly-owned subsidiary of Phillips Industries, Inc.*, 216 NLRB 885, 889, fn. 8 (1975).

November 3, 1975. Brown's normal assignment was to operate a tractor-trailer combination designated as truck number 245, which he drove between Respondent's Detroit facility and a landfill located at Belleville, Michigan, approximately 37 miles distant, hauling refuse in connection with Respondent's service to the city of Detroit.

The immediate cause of Brown's discharge was his refusal to drive a tractor-trailer combination designated as truck number 244 on May 14. The General Counsel contends that, in refusing to drive truck number 244, Brown was asserting a right which Respondent's collective-bargaining agreement with Local Union No. 247 provided as follows:

ARTICLE XXI

EQUIPMENT, ACCIDENTS AND REPORTS

Section 1. The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with the safety appliances prescribed by law. It shall not be a violation of the Agreement where employees refuse to operate such equipment unless such refusal is unjustified.

On May 12, as Brown drove truck 245 onto the landfill with his fourth load of refuse, he noticed fellow employee Frank Hamilton driving Respondent's truck 244 immediately behind him. As Brown maneuvered to dump his cargo, he saw that Hamilton was having difficulty stopping his vehicle. To avoid being hit, Brown pulled his truck out of the way.

After Hamilton had stopped, Brown got out of his truck and asked for an explanation. Hamilton explained that when he put his foot on the brake pedal to stop his vehicle, he found his brakes were not working. Hamilton stated that he "almost hit" Brown and then declared "I don't got a sign of brakes on this truck, and

especially here in the landfill pulling up hill like this." Hamilton also said he intended to drive the vehicle "back and get it fixed."⁴

After completing their tasks at the landfill, the two returned to Respondent's Detroit facility, where Hamilton approached Francis Castelono, a mechanic employed by Respondent at its Detroit facility. In the presence of Respondent's mechanic, David Ammerman and driver Brown, Hamilton requested Castelono to check or fix the brakes on truck 244. Castelono responded: "Leave it out the back and we'll get it on the weekend." Ammerman joined, saying, "Yes, we'll take care of it."⁵

On Monday, May 14, Brown reported for work at 4 a.m. He checked the oil, water, and tires on truck 245 and then proceeded to the landfill. Later that morning, Brown had difficulty with truck 245, returned to Respondent's garage, and advised mechanic Ammerman that 245 was defective. I find from Ammerman's testimony that he told Brown: "The garage is full. I've got trucks backed up. I'm not gone be [gonna] able to get to it today. The truck is gonna be down. So you might as well go home or see Otto [Jasmund] and see if there's another truck."

Brown went to the drivers' dispatch room, where he came upon his supervisor, Otto Jasmund. Brown told him that truck 245 was in disrepair and that Ammerman had told him to go home. Brown told Jasmund that "they were supposed to have fixed [245] but it still wasn't fixed." Jasmund responded: "I'll go out and check." Jasmund soon returned and advised Brown that

⁴ My findings of fact regarding the landfill incident are based on Hamilton's and Brown's testimony.

⁵ I have credited Brown's and Hamilton's testimony regarding Hamilton's encounters with Castelono and Ammerman on May 12.

he "might as well punch out and go home because they're not going to do anything for you now." After further discussion, Brown punched out.

However, before Brown could leave, Jasmund asked him to remain and drive 244. Brown answered, "No, there's something wrong with that truck." In the exchange that followed, Brown explained that "something was wrong with the brakes on the truck . . . there was a grease seal or something leaking causing it to be affecting the brakes." At this, Jasmund told Brown to go home. Jasmund's suggestion provoked Brown and an argument ensued between Jasmund and Brown.⁶

Hearing the altercation, a second supervisor, Robert Madary, intervened. Madary asked Brown to take truck 244. Brown declined, stating that the truck "has got problems and I don't want to drive it." Madary persisted, pointing out that half of Respondent's trucks "have problems," and that if Respondent attempted to deal with each of those trucks it would be unable to

⁶ Employee Walter Davis, who at the time of the hearing was in Respondent's employ, testified candidly regarding Brown's confrontation with Jasmund. In contrast, Supervisor Jasmund, who in substance testified that Brown refused to drive truck 244 because it was Hamilton's truck seemed reluctant to testify on cross-examination. This apparent reluctance gave way to unmitigated hostility under cross-examination about the absence of a repair order for truck 244, dated May 12, and the assertion in Respondent's answer to Brown's unfair labor practice charge that the same truck had been repaired and inspected on that date. When thus confronted, Jasmund glared at counsel for the General Counsel and asked, "Who gave you that information?" This outburst persuaded me that Jasmund was more interested in shielding Respondent than in shedding light on the circumstances surrounding Brown's refusal to drive truck 244. Accordingly, I have credited Davis' testimony whenever it conflicted with Jasmund's testimony, except as to the date of the confrontation. On cross-examination, Davis testified that it occurred on May 12. However, the testimony of Brown, Jasmund, and Robert Madary established May 14 as the date of the confrontation.

perform its services. Madary complained, "We've got all this garbage out here to haul and you tell me about you don't want to drive." Brown responded, "Bob, what you going to do, put the garbage ahead of the safety of the men?" Madary scorned Brown's last remark and returned to the supervisor's office.⁷ Following his exchange with Madary, Brown went home.

Later that same day, Local 247's recording secretary, John Calandra, received word that Respondent had discharged Brown. Calandra relayed that information to Brown. That same afternoon, Calandra and Brown went to Respondent's Detroit facility where they met with Supervisors Jasmund and Madary, who refused to

⁷ Madary testified on direct examination that he heard a heated argument between Jasmund and Brown in which, at first, Brown refused to drive truck 245. In the remainder of his version of the Brown-Jasmund encounter, Madary testified that Brown refused to drive truck 244 because driver Hamilton was coming to work.

In rejecting Madary's version and accepting Brown's account of their conversation, I have taken note of the latter's conviction for uttering and publishing. However, there is cause for doubting the reliability of Madary's testimony. Thus, Madary's version of the initial discussion between Jasmund and Brown contradicts Jasmund's corroborated testimony showing that there was no disagreement regarding 245. Further, Madary's testimony contradicts the credited testimony of employee Davis regarding the balance of the exchange between Brown and Jasmund. Unlike Davis who gave his testimony in a full and forthright manner both on cross- and direct examination, Madary's responses during cross-examination were frequently evasive. I also noted that in large part Madary's testimony on direct examination was in response to leading questions. Further, in light of Brown's experience at the landfill on May 12, and given Davis' credited version of Brown's exchange with Jasmund regarding the problem with truck 244, I find it likely that when confronted with a similar request by Madary, Brown responded, as he had previously, that truck 244 had problems with its brakes.

reinstate Brown.⁸ On the following day, Respondent issued a notice to Brown asserting that he had voluntarily quit on May 14. The notice also stated that Brown's misconduct on that date consisted of "Disobeying of orders (refused to drive #244)."

On May 15, Brown filed a grievance against Respondent concerning the previous day's discharge. The current collective-bargaining agreement between Respondent and Local 247 contained provisions for a three-step grievance procedure terminating in reference to a board of arbitration. However, Brown did not receive the benefit of that procedure. The Union found no merit in Brown's grievance and refused to invoke the contractual grievance procedure. Finally, on September 7, Brown filed the unfair labor practice charge which led to the instant proceeding.

B. Analysis and Conclusions

Respondent contends that the complaint herein must be dismissed because Brown did not exhaust his internal union remedies. In support of this contention, Respondent set out in its brief what it represented to be article XIX, section 12(a), (b), (c), and section 13 of the constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, which is entitled "Exhaustion of Remedies."⁹ However, this

⁸ I based my findings regarding Calandra's knowledge of Brown's discharge, Calandra's imparting of that information to Brown, and their subsequent visit to Respondent's facility upon Calandra's testimony and Brown's corroborated testimony.

⁹ The article reads as follows:

EXHAUSTION OF REMEDIES

Section 12 (a). Every member, officer, elected Business Agent, Local Union, Joint Council or other subordinate body against whom charges have been preferred and disciplinary action taken as a result thereof, or against whom adverse rulings or decisions have been rendered or who

proffered evidence is not part of the record of this case. Accordingly, it lends no support to Respondent's contention.

Even if the quoted language were extracted from the International's constitution those provisions have no application in the instant case. For clearly, they govern only internal union disputes, and not Brown's grievance.

Finally, if Respondent is suggesting that Brown was required to exhaust his remedy under the collective-bargaining agreement's arbitration and grievance procedure, such contention is wholly without merit. Under Section 10(a) of the Act, the power of the Board with

claims to be aggrieved, shall be obliged to exhaust all remedies provided for in this Constitution and by the International Union before resorting to any court, tribunal or agency against the International Union, any subordinate body or any officer or employee thereof. (b) Where a member, officer, elected Business Agent, Local Union, Joint Council or other subordinate body, before or following exhaustion of all remedies provided for within the International Union, resorts to a court of law and loses his or its cause therein, all costs and expenses incurred by the International Union may be assessed against such individual, Local Union, Joint Council or other subordinate body, in the nature of a fine, subject to all penalties, applicable where fines remain unpaid. Where such court action is by an individual or by a Local Union, Joint Council or other subordinate body against a Local Union, Joint Council or other subordinate body the foregoing provision in respect to the payment of costs and expenses shall be applicable in favor of the Local Union, Joint Council or other subordinate body proceed against in court. (c) The appeals procedure provided herein is also available to and must be followed by any member who is aggrieved by any decision, ruling, opinion or action of the Local Union, membership, officers or Executive Board, excluding collective bargaining matters.

Section 13. All decisions following trials or hearings should be made and rendered within sixty (60) days of the date the hearing or trial commenced, unless otherwise ordered by the General Executive Board. This time requirement shall not be mandatory but is only directory.

respect to unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise" Consistent with the quoted statutory language, "the Board has never shunned jurisdiction merely because a party had the contractual right to go to arbitration but has never exercised the option. [Citations omitted.]" *Aeroder, Inc.*, 149 NLRB 192, 199 (1964). It follows that Brown's failure to seek relief under the arbitration and grievance procedure after the Union had rejected his grievance did not oust the Board from its jurisdiction to process the alleged unfair labor practices in this case.

Respondent's reliance upon *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960), and *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), all of which involved actions under Section 301 of the Act to compel arbitration under a contract is misplaced. For none of these cases involved attempts to deprive the Board of its authority under Section 10 of the Act. *Aeroder, Inc.*, *supra* at 199.

The General Counsel contends that Respondent violated Section 8(a)(1) of the Act by discharging driver James Brown because of his protected concerted activity in refusing to drive truck 244, which Brown believed to be unsafe, and because he attempted to "exercise his contractual right to refuse to operate a vehicle not in safe operating condition." (G.C. br. p.3) Respondent denies the alleged violation, contending instead that Brown's refusal to drive truck 244 was unprotected because the equipment was "in good operating condition" and further that Brown "voluntarily punched out and was given a voluntary quit notice." Contrary to Respondent, I find that Brown was discharged in violation of Section 8(a)(1) of the Act.

At the outset, I reject Respondent's assertion that Brown quit his employment. There is no showing that Brown ever said he was quitting his employment. Instead the record shows that Brown refused to drive truck 244 after he had punched his timecard and then left Respondent's premises. There is no showing that Brown said anything about terminating his employment with Respondent. That same day, shortly after his departure from Respondent's premises, Brown received notification from John Calandra that Respondent had discharged him for refusing to drive truck 244. Calandra also suggested that Brown seek reinstatement to retrieve his job. The same day, Brown, in company with Calandra asked Respondent for reinstatement. Respondent rejected the request. Far from supporting the assertion that Brown voluntarily quit, these facts strongly suggest that Brown wanted his job and that Respondent discharged him on May 14, and I so find.

In *Roadway Express, Inc.*, 217 NLRB 278, 279 (1975), the Board declared:

We have held in the past that when an employee makes complaints concerning safety matters which are embodied in a contract, he is acting not only in his own interest, but is attempting to enforce such contract provisions in the interest of all the employees covered under that contract. Such activity we have found to be concerted and protected under the Act, and the discharge of an individual for engaging in such activity to be in violation of Section 8(a)(1). [Footnotes omitted.]

In that case, the Board, found a violation of Section 8(a)(1) after finding that the discharge of a driver "was caused by his refusal to drive what he believed to be an unsafe tractor, and that such refusal was an attempt to compel adherence to the provisions of the contract . . ." *Roadway Express, Inc.*, *supra* at 279-280.

Operation of the Board's policy as set forth in *Roadway Express* is not dependent on the merits of the

asserted contract claim or whether the employee expressly referred to the applicable contract in support of his action or was even aware of the existence of the agreement. *John Sexton & Co., a Division of Beatrice Food Co.*, 217 NLRB 80 (1975). The Board does require, however, that the claimed belief be "honestly held." *United Parcel Service*, 241 NLRB 1074 (1979). See also *McLean Trucking Company*, 252 NLRB 728 (1980).

In refusing to operate what he claimed to be an unsafe vehicle, Brown was asserting a right under article XXI of the existing collective-bargaining agreement between Respondent and Local Union No. 247. Further, the assertion of this right was based on Brown's honest belief that the brakes on truck 244 were inadequate. The record shows that truck 244 came to Brown's attention on May 12 while operating truck 245, when he took evasive action to avoid being hit by 244; that driver Frank Hamilton told Brown on that occasion that he was unable to stop truck 244 because it did not have "a sign of brakes"; and, that upon their return to their Detroit facility Brown heard Hamilton complain about truck 244's brakes and request that they be checked. In these circumstances, Brown's complaint 2 days later regarding truck 244's brakes was warranted. Respondent's failure to show Brown that his complaint was unfounded, by either word or demonstration, provided further basis for Brown's claim that truck 244's brakes were unsound.

That another driver subsequently drove truck 244 without incident or that Respondent's record show that truck 244 may have been in good repair are not material to the outcome of this case. For under the principles stated above, I need not decide whether truck 244 was in fact safe at the time of Brown's complaint. I therefore conclude that by discharging Brown for his refusal to operate truck 244, Respondent violated Section 8(a)(1) of the Act. *United Parcel Service, supra* at 1077.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging James Brown on May 14, 1979, Respondent has violated Section 8(a)(1) of the Act, and such violation affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action, including reinstating and making whole employee James Brown. In order to effectuate the policies of the Act, backpay computation shall be in accordance with the formula in *F.W. Woolworth Company*, 90 NLRB 289 (1950). Payroll and other records in possession of Respondent are to be made available to the Board, or its agents, to assist in such computation. Interest on backpay shall be computed in accordance with *Florida Steel Corporation*, 231 NLRB 651 (1977).¹⁰

Upon the foregoing findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

¹⁰ See, generally, *Iris Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER¹¹

The respondent, City Disposal Systems, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Discharging or otherwise disciplining its employees because they refuse to drive vehicles which they honestly believe to be unsafe to operate, a right afforded them under the collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to James Brown reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole as set forth in The Remedy section, above, for any loss of earnings suffered as a result of his discharge.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due and the right of reinstatement under the terms of this Order.

¹¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order, herein shall as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Post at its facility at Detroit, Michigan, copies of the attached notice marked "Appendix."¹² Copies of said notice on forms provided by the Regional Director for Region 7, shall, after being duly signed by Respondent, be posted by Respondent immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

¹² In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

No. 82-960

In the Supreme Court of the United States
OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

CITY DISPOSAL SYSTEMS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

KENNETH J. MCINTYRE
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800 First National Building
Detroit, Mich. 48226
(313) 223-3500

PETITION FOR CERTIORARI FILED DECEMBER 9, 1982
CERTIORARI GRANTED MARCH 28, 1983

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-890

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CITY DISPOSAL SYSTEMS, INC.

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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Case No.: 7-CA-16792

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- 10. 3.79 Answer to Unfair Labor Practice Charge
- 10.19.79 Complaint and Notice of Hearing
- 10.22.79 Answer to Complaint
- 4.11.80 Hearing
- 4.17.80
- 1.15.81 Judge's Decision
- 2. 5.81 Request for Oral Argument
- 2. 9.81 Exceptions
- 6. 9.81 Decision and Order of National Labor Relations Board
- 7.22.82 Opinion of Court of Appeals

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

Case No. 7-CA-16792

IN THE MATTER OF:
CITY DISPOSAL SYSTEMS, INC.
and
JAMES BROWN, AN INDIVIDUAL

NATIONAL LABOR RELATIONS BOARD
*300 Patrick V. McNamara Federal
Building, Room 389-A
Detroit, Michigan 48226
Friday, April 11, 1980*

Pursuant to notice, the above-entitled matter came on for hearing at approximately 10:00 o'clock, A.M.

BEFORE:

The Honorable LEONARD M. WAGMAN
Administrative Law Judge

APPEARANCES:

MS. BETSEY ENGEL, ESQ.
300 Patrick V. McNamara Federal Building
477 West Michigan Avenue
Detroit, Michigan 48224,
Counsel for the General Counsel.

MR. MEYER W. LEIB, Esq.

LEIB & LEIB

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Suite 106

Southfield, Michigan 48075

Appearing for Respondent, City Disposal Systems,
Inc.

[4] [April 11, 1980, session]

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[13] JAMES BROWN,
a witness called by and on behalf of the General Counsel,
being first duly sworn, was examined and testified as
follows:

* * * *

DIRECT EXAMINATION

BY MS. ENGEL:

Q Will you please state your name and address for the record?

A James R. Brown. I live at 18134 Riopelle, City of Detroit.

Q Mr. Brown, turning your attention to May of 1979, were you employed?

A Yes, I was.

Q Where were you employed?

A City Disposal Systems.

Q And when did you start working at City Disposal Systems?

A November 3, 1975.

Q What was your job classification at City Disposal?

[14] A Truck driver.

Q In 1979, were you assigned to drive any particular truck for City Disposal?

A Yes.

Q What truck was that?

A Truck 245.

Q And who was your immediate supervisor?

A Otto Jasmund.

Q Was there a union at City Disposal?

A Yes, there was.

Q What union was that?

A Teamsters.

Q Did the Teamsters have a contract with City disposal?

A Yes, they did.

Q Did that contract mention anything about safety?

A Yes, it does.

Q Do you, by any chance, recall the section number?

MR. LEIB: Just a minute. I think counsel knows that the document speaks for itself.

Q Okay. Now, Mr. Brown, turning your attention to Saturday, May 12, 1979, did you work that day?

A Yes, I did.

Q When did you report for work?

A Four o'clock, a.m.

Q What did you do after you reported to work?

[15] A I checked the truck out for the oil, the water, and flat tires and proceeded to the land fill.

Q How many loads did you take out that day?

A I believe it was four.

Q How was your truck running that day?

A The first two loads, it was running fairly well. On the third and fourth, I commenced to having a small problem.

Q What was the problem?

A The fifth wheel bracket had broke loose, the weld had broken and it caused the back of the trailer to sway.

Q Okay, now you said you took four loads out to the land fill that day. Other than this problem with your truck, which I believe is truck 245, is that correct?

A That's correct.

Q Did anything else happen out at the land fill?

A On my fourth or last load, as I entered the yard there was another truck that was coming behind me.

Q Who was driving that truck?

A Frank Hamilton.

Q And what truck was he driving?

A 244.

* * * *

[16] A As I entered the land fill, I noticed the truck coming up behind me was coming pretty fast and I was sitting in the middle of the street so I thought that he wasn't going to be able to stop in my opinion, and I pulled on into the dump and pulled around out of his way so that he would have enough room to stop the vehicle.

Q And did truck 244 stop?

A He eventually stopped, yes.

Q Now, after this incident, what did you do after?

A I got out of the truck and went into the yard which is at the land fill and I asked Frank Hamilton what was the problem. He said—

* * * *

[18] Q Okay, Mr. Brown, you said you spoke to Hamilton.

A Yes, I did.

Q Why don't you go on and tell us what the two of you talked about.

* * * *

A Frank Hamilton related to me that he was having difficulty in stopping the truck because the brakes wasn't holding and the wheels was smoking and there was a lot of smoke around the truck at the particular time because the oil was running out on the brake drum.

Q Did you see the smoke?

A Yes, I did.

Q Did you return to work after this incident?

A Yes, I went on and dumped the load and I returned my truck to the yard which is in the City of Detroit.

Q Now, after you returned your truck to the yard in the City of Detroit, did you speak to anyone?

A Yes.

Q Who did you speak to?

A I spoke to Dave Ammerman and Frances Castelono.

Q Okay, who is Mr. Ammerman?

[19] A Ammerman is the head mechanic.

Q And Mr. Castelono, what was his position?

A He was supervisor.

Q Where were you when you spoke to them?

A I spoke to them out in the yard.

Q Did you speak to them anywhere else?

A Yes.

Q Where was that?

A In the driver's room.

Q Now, was anyone else present when you spoke to them?

A Frank Hamilton was present also.

Q Now, in this conversation—

MR. LEIB: Counsel, are we speaking of May 12?

MS. ENGEL: Yes, we're still on May 12.

MR. LEIB: All right.

Q Now, in this conversation with Mr. Ammerman and Mr. Castelono, what was said at that time and by whom?

A I told Frances Castelono and Dave Ammerman that my trick was—that the fifth wheel bracket had broken and that it was in need of repair. Dave Ammerman and Frances Castelono checked the truck out and definitely said that it was in need of repair. Also, there was Mr. Leach there, that he is the welder and he verified the fact that the weld had broken on the bracket and it was in need of rewelding.

Q Okay, now, was this in the driver's room?

[20] A This was in the driver's room?

Q Okay. Now, you said that Mr. Hamilton was there also. Did he participate in this conversation?

A Yes, he did.

Q And how did he participate?

A I was explaining to Frances about the repair on the truck and Frank Hamilton asked Frances—

MR. LEIB: Again, objection, your Honor.

JUDGE WAGMAN: Okay. The same rule.

MR. LEIB: Okay.

JUDGE WAGMAN: I'm not going to receive it for the truth of the matters as[s]erted.

MS. ENGEL: Okay.

A Frank Hamilton asked Frances Castelono when he was going to repair his truck. He said, "I almost hit Brown at the land fill. What are you going to do, wait till I tear up someone or kill someone before this truck gets repaired?"

Q Now, after this conversation—first of all, was there any further discussion in this conversation?

A Yes, there was.

Q And what was that, and by whom?

A Frances Castelono said that they would repair my truck over the weekend, which was Saturday and it would be repaired Sunday, and for me to punch out and go home. And he said [21] that he would repair 244, which was Frank's truck, over the weekend too. Dave Ammerman said that we wouldn't be able to repair it because we don't have brake shoes for this particular truck. So he said,

"We'll get to it"—Frances said, "We will get to it first thing Monday morning."

Q Were you familiar yourself with truck 244?

A Yes.

Q How were you familiar with it?

A I had driven the truck in the past and I had put in repair orders for it. I was also supervisor and I received numerous write-ups on this particular vehicle.

Q When were you a supervisor?

A In—from March of '77 to, I believe it was March of '78.

* * * *

Q Mr. Brown, you said you had driven 244 in the past. [22] Could you remember when that was or tell us when that would have been?

A I think it was May of '78.

* * * *

[37] Q Okay, now, back to May of 1979. What was your next day of work after May 12, 1979?

A May 14, 1979.

Q And what did you do after reporting in to work that day?

A I reported for work at 4:00 o'clock that morning. I [38] checked out the oil and the water and to see if I had any flat tires on truck 245. I got my bill signed and I proceeded to the land fill.

Q Did you have any problem with truck 245 that day?

A Yes, I did.

Q What was the problem?

A As I reached—

MR. LEIB: We will stipulate on the record that this man had a problem with truck 245, returned it to the garage and that it was agreed by the company that there was something wrong with truck 245.

JUDGE WAGMAN: How's that?

MS. ENGEL: I have no problem with that.

JUDGE WAGMAN: Will you join the stipulation?

MS. ENGEL: Sure, I'll join that.

JUDGE WAGMAN: Thank you. I accept the stipulation. Now, on to 244.

MS. ENGEL: Right.

Q Now, Mr. Brown, after you returned to the garage that day and reported the problem with 245—first let me ask you this: Who did you report it to?

A I reported the incident to Otto Jasmund.

MR. LEIB: We will stipulate that it was—that he did talk to—

MS. ENGEL: Your Honor, I would prefer just to go [39] through the witness' testimony at this time.

JUDGE WAGMAN: All right.

Q Is Mr. Jasmund the first person you spoke to when you returned to the company?

A No, he's not.

Q Who did you speak to before Mr. Jasmund?

A I spoke to Dave Ammerman.

Q And where did you speak to Mr. Ammerman?

A In the garage.

Q Was anyone else present?

A Keith Hall and one other mechanic.

Q What was said at that time and by whom?

A I told Dave Ammerman that they had not repaired my truck and that it was still broke, and he said they was unable to do so over the weekend and that the truck would be down for the rest of the day, for me to punch out and go home.

Q Now, after this conversation with Mr. Ammerman, what did you do?

A I went to the driver's room, and above the driver's room is the supervisor's office. I went up and told Otto that my truck was down and Dave Ammerman said for me to go home.

Q Okay, now, when you refer to Otto, who do you mean?

A Otto Jasmund is the supervisor.

[40] Q Okay. Now, where is the supervisor's office in relation to the driver's room?

A It's right off of the driver's room up two steps.

Q And is this located in 1550 Harper?

A Yes, it is.

Q After you spoke to Otto, where did you go?

A I stayed in the driver's room.

Q Was anyone else present?

A Walter Davis was present and Al Parson, I believe his last name is.

Q Okay, now, what was said at this time and by whom?

A Otto said to me, "Just a minute," and he left the driver's room—

MR. LEIB: I can't hear you.

A Otto Jasmund said, "Just a minute," and he left the driver's room.

Q Okay, and did he return?

A Yes, he did.

* * * *

[41] Q Mr. Brown, I'm going to ask you to start again describing what was said in this conversation in the driver's room and by whom.

A Start from the time I brought the truck back or where I left off?

Q When you entered the driver's room.

A I entered the driver's room and proceeded up to the supervisor's office and I told Otto Jasmund that Dave Ammerman said that my truck was down and they had not repaired it. It would be down the rest of the day, for me to punch out and go home.

Q What did Otto say?

A He said, "Just a minute," and he left the driver's room.

Q Did Mr. Jasmund return to the driver's room?

A Yes, he did.

Q About what period of time would you say expired?

A About three to five minutes.

Q What was said and by whom when Mr. Jasmund returned?

A Otto returned and he said, "Brown's truck is going to be down for the rest of the day," and for me to punch out and go home.

Q And who else was there at that time?

A Walter Davis and Al Parson.

Q Did the conversation continue?

[42] A It didn't extend—it continued, yes, for a brief minute.

Q Okay, what else was said and by whom?

A I asked Otto why did Dave have a right, as being a mechanic, to tell me to go home? Why couldn't I just help him in the garage or chase parts as we normally would do if the truck was down? And Otto Jasmund told me, he said, "There's nothing to do, Brown, you might as well go home." And he went back into his office.

Q Okay. What did you do at that point?

A I talked to Walter Davis a little while, and I was talking to Mr. Davis, one of the other drivers, for a few minutes.

Q Did you have any further conversation with Otto that day?

A Yes, I did. He came back out of the supervisor's office into the driver's room, and he said, "Brown, do you want to take truck 244?"

Q And what did you say?

A I told him no, I did not.

Q What else was said in that conversation?

A He said, "Well, why don't you want to take it?" And I said, "Well, Otto, the truck has problems." And do you want me to—

Q Please continue.

[43] A He said, "Well, Brown, I'm tired of hearing all this"—can I say it?

Q Yes, you can.

A He said, "I'm tired of hearing all this shit about these damn trucks being this or that, something's wrong with them; you don't want to take one truck and another guy don't want to take a truck and we have all this garbage out here to haul." And I said, "Hey, I'm tired of it too. I came in here to work. They told me my truck was going to be repaired. It was not. I be here every morning. I come to work and you want to send me home." I said, "This is—I don't understand this."

Q Now, did you speak to anyone else in management that morning?

A Yes.

Q Who?

A Bob Madary.

Q What is his position?

A At that time, I didn't know what it was.

Q Is he a supervisor?

A They say—according to my knowledge now, he's a supervisor.

Q And who was present when you spoke to Madary?

A Otto Jasmund, Walter Davis and Al Parson, I believe.

Q Okay. And when was this when you spoke to Madary?

[44] A Right preceding the conversation I had with Otto Jasmund.

Q What was said in that conversation and by whom?

A Bob said, "Brown, why don't you go ahead on and take the truck." I said, "No, Bob, I don't want to take the truck because the truck has got problems and I don't want to drive it."

Q And what truck are you referring to now?

A Truck 244.

Q Continue with what was said and by whom.

A He said, "Brown, you know half the trucks around here have problems. If we go around trying to solve all the problems with the trucks we have, we never would get all this garbage hauled." He said, "We've got all this garbage out here to haul and you tell me about you don't want to drive." I said, "Bob, what you going to do, put the garbage ahead of the safety of the men?" And he said, "Oh, I don't want to hear that shit," and he walked on back into the supervisor's office.

Q Now, during the sequence of these conversations, did you punch out?

A I had punched out when Otto first came in and told me to punch out and go home.

Q After Madary left, what did you do?

A I stayed around and talked to Walter Davis for a little [45] while longer.

Q Then what did you do?

A I left.

Q Where did you go after you left?

A I went home.

Q Did you speak to anyone else that day about work?

A Yes, I received a call about 12:00 or so from Mr. John Calandra.

Q And who is John Calandra?

A He is the business agent of Local 247.

Q Have you ever spoken to Mr. Calandra before?

A Yes, I have.

Q Did you recognize his voice that day?

A Yes, I did.

Q Did he identify himself when he called you?

A Yes, he did.

Q What was said in that conversation?

A He said, "Brown, the company has terminated you for refusing to drive truck 244," and I said, "What?" I said, "Well, man, there's something wrong with the truck," and he said, "Well, you better get down here so we can get this matter straightened out.

Q Did you return to work?

A Yes, I did.

Q About what time was that?

[46] A About 12:30.

Q And what happened when you returned to work?

A We had a meeting in the supervisor's office at 1550 Harper with Otto Jasmund, Bob Madary, John Calandra and myself.

Q And what was said at that time and by whom?

A I don't remember all the conversation but I asked Otto what was the problem. He said, "Brown, we have found out that we have a right to discharge you or as a voluntary quit for refusing to drive a truck." John Calandra said, "Hold it, Otto," he said, "maybe we can get this thing straightened out." And he said, "If the truck had problems," he said "why don't you just put the man back to work if he felt the truck had problems." And Otto said, "No, I don't want to."

Q And did Mr. Madary say anything?

A John Calandra asked Bob Madary what did he think about it, and Bob Madary said, "Well, I go along with Otto. No, we don't want him."

MS. ENGEL: I have no further questions.

* * * *

[48]

CROSS-EXAMINATION

BY MR. LEIB:

Q Mr. Brown, you were assigned truck number 245, isn't that true?

A That's true.

Q You had been driving 245 for all of the year 1979 prior to this particular incident.

A Yes.

Q And only truck 245.

A Yes.

Q You had not driven any other truck, isn't that correct?

A That's not correct.

Q Didn't you only drive truck 245 during the year 1979.

MR. ENGEL: Objection, Your Honor, that's irrelevant.

JUDGE WAGMAN: Overruled.

A May I have the question again, please?

Q During the year 1979, the only truck you ever drove was truck 245.

A No, that's not correct.

Q Tractor?

A Tractor.

Q Okay. But that was the only tractor you drove was 245.

A No.

[49] Q What other one did you drive?

A I drove truck 246.

Q When was that?

A It was in '79. I don't remember the exact date.

* * * *

[50] Q And according to that document, you drove truck 245, did you not, on Saturday?

A Yes, I did.

Q And you drove it on four occasions—

A That's correct.

Q On Saturday, May 12.

A Yes.

Q You started out that morning at 4:30 in the morning, did you not?

A That's correct.

Q And you concluded your work at what time?

A I don't remember the exact time. Approximately 2:00 or 3:00.

Q Now, you are required, are you not, to drive from the place of operation of City Disposal Systems, which is located where?

A At 1550 Harper in the City of Detroit.

[51] Q All right. From 1550 Harper, you drive to a dump site, isn't that correct?

A That's correct.

Q And that dump site is located where?

A In Sumpter, Michigan.

Q And that's how many miles?

A Approximately 37 miles.

Q Okay. And so that would be approximately 75 miles, return, both ways, up and back?

A Yes.

Q Would you say that each trip would take, going and coming, approximately three, three and a half hours?

A No, I would not.

Q How many hours would it take?

* * * *

A Depending on the weather and the condition of the truck.

Q Normal conditions.

A Normal conditions it would still depend on the truck and how much weight you were carrying.

[52] Q With reference to your particular truck, no other truck, just yours, how long would it take just for one load?

A To drive out and back?

Q Right.

A Approximately two hours and fifteen minutes.

Q All right. And four loads?

A Take you roughly seven, eight hours—depending—eight hours or so.

Q Would you work more than that? Ten hours?

A Yes, sometimes more than that too.

* * * *

[65] Q Mr. Brown, under the daily driver rules concerning the equipment, before leaving a morning with the truck, certain requirements were required of the driver to make sure that everything was done properly. Were you familiar with those rules, isn't that correct?

A That's correct.

Q So you knew then, both from in a supervisory position as well as an hourly rated employee or an employee who received funds other than on an hourly rated basis, that you were to [66] comply with these particular rules governing the equipment, is that correct?

A Yes.

Q Okay. Now, Mr. Brown, you filed in fact a grievance, did you not, with your local?

A Yes, I did.

* * * *

Q Mr. Brown, you filed a grievance on May 15, 1979—

* * * *

[67] A Yes, I did.

* * * *

JUDGE WAGMAN: Is that your signature on the bottom?

A Yes, it is.

JUDGE WAGMAN: It's known as Respondent's Exhibit 4.

* * * *

[71] Q And you refused a direct order by Mr. Otto Jasmund to [72] take truck 244?

A No, I did not refuse a direct order.

Q You would not drive truck 244, would you?

A He asked me if I wanted to. He didn't order me to drive the truck.

Q Oh, I see. Now, your position is that you were never ordered to drive the truck, that it was up to your voluntari-

ness as to whether or not you wanted to, is that what you're saying?

MS. ENGEL: Objection.

JUDGE WAGMAN: I don't want to know what his conclusion is. I want to know what he said. I'll make the conclusion. You're going to take away my whole job. All I want you to do is ask him what he said and what the other man said to him. Don't ask for a summary because I'll have nothing to do.

Go ahead.

Q Did Mr. Otto Jasmund direct you to take truck 244 out?

A No.

Q He never told you directly to take truck 244 out?

A No, he did not.

Q Did Mr. Madary direct you to take truck 244 out?

A No, he did not direct me to.

Q Did they ever request you to take 244 out?

A They requested me to take it, yes.

Q You refused to do so.

[73] A Yes, I did.

Q Have you ever been arrested and convicted of a felony?

A Yes, I have.

Q How many different times have you been arrested and convicted of a felony?

A Once.

Q And what felony was that you were arrested and convicted on?

A Uttering and publishing.

* * * *

[77] REDIRECT EXAMINATION

BY MS. ENGEL:

Q Mr. Brown, did you tell Otto Jasmund why you wouldn't [78] drive the truck 244?

A Yes, I did.

MR. LEIB: Object that it's been testified to an direct examination.

JUDGE WAGMAN: Okay. Overruled. Did you?

A Yes, I did.

Q What did you tell him?

A I told him that the truck had problems and I didn't want to drive it.

Q Did you tell Bob Madary why you didn't want to drive the truck?

A Yes, I did.

Q What did you tell him?

A I told Bob Madary that the truck had problems, that I didn't want to drive it.

* * * *

[79] WALTER DAVIS,
a witness called by and on behalf on the General Counsel,
being first duly sworn, was examined and testified as
follows:

* * * *

[80] DIRECT EXAMINATION

BY MS. ENGEL:

Q Mr. Davis, please state your full name and your address for the record.

A Walter Davis, 4061 Fourth Street.

[81] Q What city is that located in?

A Detroit.

Q And that's in the state of Michigan?

A Right.

Q Are you employed, Mr. Davis?

A Yes.

Q Where are you employed?

A City Disposal.

Q And where is that located?

A 1550 Harper.

Q Is that in Detroit also?

A Yes.

Q When did you start working for City Disposal Systems?

A 4-10-78.

Q What is your job classification there?

A Truck driver and machine operator as of now.

Q Who is your immediate supervisor?

A Otto.

Q What is Otto's last name?

A I think it's Jasmund.

Q Do you know Mr. James Brown?

A Yes.

Q How do you know Mr. Brown?

A By working there as a truck driver.

Q When you say there, where you are referring to?

[82] A City Disposal.

Q And turning your attention to May 14, 1979, were you at work that day?

A Yes.

Q Did you speak to James Brown that day?

A No, not directly. I was in the room when he came in.

Q What room were you in?

A The driver's dispatcher's room.

Q And where is that located?

A It's a little office that most of the drivers hang around in. It's where the time clock is. It's where we clock in every morning.

Q Is that at the Detroit location?

A Yes.

Q And what were you doing in the driver's room?

A I was waiting till my truck got fixed. There was something wrong with it. I can't remember exactly what was wrong with it, but it was down and I was just waiting there.

Q Now, when Brown came into the room, who else was present?

A I think Al Parson. I think that's his last name.

Q And was anyone else around?

A Not at the present.

Q When Mr. Brown came in, what did he do?

A He came in expressing that he guess he would go home [83] because his truck was down.

Q Did he speak to anyone in management?

A Well, at that point, then Otto came out of another little office that was right close where it was and he came out and asked Brown what was wrong. So Brown said his truck

was down. Something was wrong with it, that they were supposed to have fixed it but it still wasn't fixed. So Otto said then, "I'll go out and check." So when Otto gets back, he made the statement, said, "Well, might as well punch out and go home because they're not going to do anything for you now."

Q What happened at that point.

A And they stood around and started swapping words, Brown punched out, and Otto says, "Well, why don't you stick around till you can drive 244?" Brown replied back, said, "No, there's something wrong with that truck," just like that.

Q Did the conversation continue after that?

A Yes.

Q And what happened? What was said and by whom?

A So Brown said something was wrong with the brakes on the truck, said there was a grease seal or something leaking cause it to be affecting the brakes. So then Otto said, "Well, you might as well go on home then," again. So then they got in a big rigamarole, swapping word for word, swearing going on.

Q Now, was anyone else in management present at any time while [84] you were in the driver's room?

A Well, about that time time then, Bob Madary came out and they was in such a raise [*sic*] then, that's when I turned and walked out of the door.

Q So were you present at any time when Mr. Madary was in the room?

A No, I went out at that point.

Q Mr. Davis, have you ever driven truck 244?

A Yes, I did.

Q When did you drive it?

A June 9.

Q Of what year?

A Of '78.

Q What, if anything, happened on June 9, 1978?

A I had an accident with it.

Q Why don't you describe that accident to us.

A It was a defect in the brakes then. I was put on what they call a wood box trailer there and it didn't have proper

brakes on it, so I was driving along in the the traffic, a truck stopped in front of me and I hit him on the right rear corner.

Q And this was truck number 244?

A That was truck number 244.

MS. ENGEL: I have no further questions.

* * * *

[103]FRANK HAMILTON,
a witness called by and on behalf of the General Counsel,
being first duly sworn, was examined and testified as
follows:

* * * *

DIRECT EXAMINATION

BY MS. ENGEL:

Q Mr. Hamilton, will you please state your full name
and address for the record?

A My address is 48699 Wear Road, Belleville,
Michigan.

MR. LEIB: I didn't hear.

JUDGE WAGMAN: Wear Road? You have to speak up.

MR. LEIB: What city is that? Belleville?

A Which would be Sumpter Township.

[104] Q What is your first name, sir?

A Frank Hamilton.

Q Mr. Hamilton, are you employed?

A Yes.

Q Where are you employed?

A City Disposal.

Q Where is that located?

A 1550 Harper.

Q In the city of Detroit?

A Yes.

Q What is your job there?

A Truck driver.

Q And who is your immediate supervisor there?

A Bob Madary.

Q Does anyone else supervise you?

A And Otto.

Q What is Otto's last name?

A I can't think of it right now. Jasmund.

Q When did you start working at City Disposal?

A It was off and on ever since '77.

Q Were you working there in May of 1979?

A Yes.

Q During May of 1979, were you assigned to drive a particular truck?

A Yes.

[105] Q What truck was that?

A 244.

Q Can you describe the condition of truck 244 in May of 1979?

A Well, the truck run all right but I didn't have too good of brakes.

Q Did you ever have problems with brakes?

A Yes.

Q How often did you have problems with the brakes?

A Well, they had a computer valve or something like that on there and you'd have to test them all the time. And then sometimes when you put your foot on the brakes, you had nothing. Then again, you put your foot on the brakes, you had pretty fair brakes.

Q Mr. Hamilton did you ever have any accidents in truck number 244?

A Yes.

Q How many?

A Two.

Q Do you recall when these accidents occurred?

A I can't remember the dates.

Q Were they prior to May of 1979? Before May of 1979?

A They were before, yes.

Q What happened in the first accident you had in truck 244?

[106] MR. LEIB: Can I have a date, please?

JUDGE WAGMAN: The first thing is, can you give us any more information about the date or roughly around the date or something as to the timing of it in relation to May of 1979? Six months, four months, two years, a year.

A Before the accident?

JUDGE WAGMAN: Well, in relation to May 14, 1979. This first accident occurred when?

A Well, I really don't know, but I think it was in the fall of the year.

JUDGE WAGMAN: Of what year?

Q Of 1978?

A I would say yes, '78.

Q And what happened in that accident?

A I was coming down the expressway and I was traveling around 45, 50, seeing all the traffic was slowing down.

Q What expressway were you on?

MR. LEIB: Your Honor, may I have—

A Interstate 94.

* * *

[107] A I was coming down Interstate 94 and I was on about a—well, I was about a half a mile from Trumbull and there was a car, a limousine, kept traveling beside me and he'd keep cutting in front of me and cutting out. And then I looked up and I see another car had stopped. There was about four cars stopped. And I said, well, I've got plenty of distance, so I applied my foot on the brakes lightly to check it and this limousine cut right back in front of me again, so that shortened my distance. And when I done that, I looked and the trailer was sliding and the tractor kept going and I just slid right on into the limousine.

[108] Q So what was the problem with the truck when it hit the limousine?

A Well, the brakes on the tractor wasn't helping me at all.

Q Now, you said there were two accidents. Can you, first of all, describe to pinpoint a little better when the date of the second accident was?

A And that occurred in the spring of the year, I would say about two months later.

Q After the first one.

A After the first one. And I was coming up on 94, getting ready to go to the exit I was going to right at 75. And I was coming up in there and I seen the truck when it came up on 94, so naturally I was running kind of slow and I even had to shift the gear and I looked in the mirror to

see if anybody was coming up on the side of me, I had my signal light on, and this—I got my eyes back on the road—this truck had stopped. And when it stopped, I hit my brakes, I didn't have no place to go because this other guy was on the side of me, and I went to put my foot on the brakes and I slid right into the truck.

JUDGE WAGMAN: What?

A I slid into the truck.

Q Mr. Hamilton, on either of these two occasions, did you fill out an accident report?

A Yes, I did.

[109] Q Could you describe what you filled out that you're calling the accident report?

A Well, it was about the brakes on the truck. I know about that.

Q Who did you give this accident report to?

A One of them was turned in to the Detroit police and the State Police have the other one.

Q Did you fill out any kind of accident report for the company?

A I think I did. I don't know exactly.

JUDGE WAGMAN: Does the company have an accident report form?

A Yes.

JUDGE WAGMAN: How long have they had it?

A Oh, I imagine ever since I've been there.

JUDGE WAGMAN: What does it say on the piece of paper?

A Well, you have to give your name and address and describing everything.

JUDGE WAGMAN: Have you ever filled one out?

A Yes, I have. I think I have.

JUDGE WAGMAN: When was the last time you filled one out?

A That I couldn't say.

JUDGE WAGMAN: Who did you give it to?

A Well, I'd have to turn it in to my supervisor.

[110] JUDGE WAGMAN: Who was?

A Otto Jasmund.

Q Mr. Hamilton, turning your attention to Saturday, May 12, 1979, were you at work that day?

A Yes, I was.

Q What truck were you driving?

A 244.

Q Where did you drive truck 244 that day?

A To the land fill.

Q How many times did you go out to the land fill that day?

A I think, five times.

Q How were the brakes that day on 244?

A Oh, the same as usual. You know, you have brakes and then you don't have them. And you had to be careful with it.

Q Did you have any problems with the brakes that day?

A No, not until, let's see, the fourth load.

Q What happened on the fourth load?

A I like to hit James Brown.

Q Would you describe what happened for us, please?

A Well, we was both going over to the land fill together and he was just ahead of me. He made a turn and then started backing up to dump. I was coming in. My front end slid over and I jammed my foot on the brakes to stop the truck, and if he hadn't been looking at me, I would have hit him.

Q Did your brakes work that day?

[111] A No.

Q What did you do after that incident with Mr. Brown?

A I brought the truck back to the relay.

Q What do you mean by the relay? What address is that?

A 1550 Harper.

Q What did you do once you reached 1550 Harper?

A Took the truck to the back and parked it.

Q Did you speak to anyone at that time?

A Yes, I did.

Q Who did you talk to?

A I talked to Frances Castelono.

Q Anyone else?

A Let's see, who else was there. Dave Ammerman.

Q And where were you?

A In the driver's room.

Q Was anyone else there?

A There were some fellows standing there, yes.

Q Who were they?

A And Brown was there, and I don't know whether Davis—there was three or four drivers in there.

Q What was said at that time and by whom?

A Well, I asked Frances would he check or fix the brakes on 244.

Q When you say Frances, you mean Mr. Castelono?

A Yes, Mr. Castelono. And he says, "Leave it out the [112] back and we'll get it on the weekend." I said, "Okay."

Q Did Mr. Ammerman say anything?

A And Mr. Ammerman said, "Yes, we'll take care of it. We'll take care of it." That's all.

Q Mr. Hamilton, how often often did you complain about 244's brakes.

A All the time.

Q To your knowledge, did the company fix the brakes whenever you complained about them?

A Yes, the brakes was adjusted but they wouldn't last. It just seemed like everything went off and on. You'd be driving, especially on a moist day, you'd be driving and you have to apply your brake, no brakes. It was only on the tractor, it didn't have the trailer adjusted up right and if the trailer would catch and hold right, a person could manage. But when you find out the trailer didn't catch ahold, you had to take it easy.

Q Now, Mr. Hamilton, if something goes wrong with your truck, what is the procedure that you're supposed to follow at work?

A Well, if something was wrong with it, you'd have to bring it in and let them fix it. Then I have to go without a truck.

Q Who would you report it to?

A The supervisor.

Q Would you do anything else? Would you write anything out?

[113] A Well, we had a bulletin board there. We could put it on the bulletin board.

Q And what would you put on the bulletin board?

A That I didn't have any brakes.

Q Would you write that out—

A Yes, on a piece of paper.

Q What would you write on?

A The tractor wouldn't have any brakes.

Q Would you write it on a piece of paper?

A Yes.

Q Any special kind of piece of paper?

A Oh, yes, there's some little square sheets there we can write them on.

Q And where was this bulletin board located?

A It would be on the wall on the right-hand side of the driver's room.

Q Did you ever put up one of those little sheets of paper on the bulletin board?

A I most generally told somebody about it.

Q But did you ever put up a little piece of paper?

A About once or twice.

Q And what truck did you talk about on that?

A 244.

* * * *

[125]

CROSS-EXAMINATION

Q Mr. Hamilton, I show you Respondent's proposed Exhibit No. R-7 and ask you if your name appears thereon?

A (No response)

Q Does your name appear thereon, Mr. Hamilton?

A No.

Q It doesn't appear thereon? Isn't this your name, F. Hamilton, there?

A Right. Right.

Q Okay.

A Yes.

Q Truck 244?

A Yes.

Q And is it not true that on May 15, 1979 you drove—made seven trips that date?

A Possible, yes.

Q You recognize this document, don't you?

A Yes, I do.

[126] Q And this document says seven trips were made.

A Yes.

* * * *

[127] Q Mr. Hamilton, this is a daily packer report on May 16, 1979. Does your name appear thereon?

A Yes.

Q Your name appears on May 16, 1979 one, two, three, four—

MS. ENGEL: Your Honor, I believe the document speaks for itself.

JUDGE WAGMAN: Well, I think he's going to help him but I need it myself.

Q Six times, is that not true, Mr. Hamilton?

A It's there six times.

Q And so you made six trips on truck 244 on May 16 to the dump, right? Isn't that correct?

A Right. It's on that document.

* * * *

[140]

REDIRECT EXAMINATION

BY MS. ENGEL:

Q Mr. Hamilton, turning your attention back to May 12, 1979, after—when you were out at the land fill, and this was your fourth trip out there, did you have any conversation with Mr. Brown?

A Yes, I like to hit him.

Q I beg your pardon?

A I like to hit him.

MR. LEIB: It's been asked and answered.

[141] JUDGE WAGMAN: No, that's a different question.

Q When you say you like to hit him, you mean you almost hit him in the truck?

A Yes.

Q Okay, after that incident, did you have any discussion with him about it.

A No. Me and him started talking, and I said, "I got to take this thing back and get it fixed because right here on the land fill when I was making a turn the truck slid," and if he didn't look, wasn't looking out his mirror and I'm trying to get away from him, he stopped and I just run right on up to him and I—

JUDGE WAGMAN: We already had that.

MS. ENGEL: I know, but I'm trying to get out, was there any conversation.

JUDGE WAGMAN: Did you say anything?

A No, other than about the truck, and I said, "When I get back I'm going to take it in and get it fixed."

MR. LEIB: I'll move to strike, your Honor.

JUDGE WAGMAN: Why do you want to strike it?

Q Who did you say that to?

A I talked to Frances Castelono about it.

Q I know that, but while you were—we're not taking about being back at the garage. We're talking about at the land fill after you almost had this incident with the truck, [142] did you speak to anyone about it?

A Other than Mr. Brown, there was nobody else. There was me and him.

Q Did you speak to Mr. Brown at that time?

A About the truck?

Q Yes.

A Yes.

Q Okay. What was said at that time?

JUDGE WAGMAN: What did you say to him?

A I just said, "Look, Brown, I almost hit you. Looks like I don't got a sign of brakes on this truck, and especially here in the land fill pulling up here like this." And he said, "I kept seeing you come back and coming up into me." So when I got it stopped, that's what I told him. I said, "I'm going to have to carry it back and get it fixed."

* * * *

[164]

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* * * *

[166]

JOHN CALANDRA

a witness called by and on behalf of the Respondent, after being first duly sworn, was examined and testified as follows:

* * * *

DIRECT EXAMINATION

BY MR. LEIB:

Q Mr. Calandra, where are you employed?

A Teamster Local 247. I am recording secretary.

Q What are your duties, Mr. Calandra?

A I beg your pardon?

Q What are your duties?

A Well, my duties is to take care of all the grievances at my companies. I've got a lot of companies on the east side. Whenever a guy has a problem with one of my companies I try to resolve the grievances. Plus, I do a lot of other things too.

Q All right. Is one of the companies that you handle City Disposal Systems, Inc.?

[167] A Yes, it is, sir.

Q And, there is a contract, is there not, with City Disposal?

A Yes.

Q That was entered into on November 1, 1977?

A Yes, sir.

Q That is Exhibit Number—

MS. ENGEL: General Counsel's 2.

Q That is General Counsel's 2. Now, Mr. Calandra, do you know Mr. James Brown?

A Yes.

Q An employee of City Disposal Systems, Inc.

A Yes, sir.

* * * *

[178]

CROSS-EXAMINATION

BY MS. ENGEL:

Q Mr. Calandra, on the day that James Brown was discharged you were informed of the discharge, weren't you?

A Yes.

Q And, you spoke to Mr. Brown that day, didn't you?

A Yes. He came to the office.

Q Now, you and Mr. Brown went down to City Disposal that day, didn't you?

A Yes.

Q And, you met with Mr. Jasmund, didn't you?

A Yes.

Q And, Mr. Madary was there also, wasn't he?

A Yes.

Q You asked Mr. Jasmund and Mr. Madary to take James Brown back to work, didn't you?

A Yes.

Q And, they refused, didn't they?

A Yes.

* * * *

[180]

JAMES BROWN,

was recalled to the witness stand and was examined and testified as follows:

CROSS-EXAMINATION

BY MR. LEIB:

Q Mr. Brown, you received a copy of this voluntary quit, did you not? Which is identified as R-10?

MS. ENGEL: Excuse me, your Honor, before Mr. Leib continues; could you please show me what you are asking about, Mr. Leib?

MR. LEIB: Yes.

MS. ENGEL: Okay. R-10.

JUDGE WAGMAN: Do you have a copy of it?

MS. ENGEL: I have a copy of it right here.

Q (By Mr. Leib): You received this, did you not?

[181] A Yes, I did.

Q That's the first page of this document, correct? Is it not—

JUDGE WAGMAN: You didn't even answer. Is it correct that it's the first page of the document?

THE WITNESS: Yes, it is.

* * * *

[191]

REDIRECT EXAMINATION

BY MS. ENGEL:

Q Mr. Brown, I am going to show you the first page of Respondent's 10. When did you receive that?

A May the 14th.

Q What time of day did you receive it?

A Around 1:00 o'clock P.M.

Q Who was present when you got that?

A George—I mean, John Calandra, Otto Jasmund, and Bob Madary and myself.

* * * *

[215]

DAVID AMMERMAN,

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

* * * *

DIRECT EXAMINATION

BY MR. LEIB:

Q Mr. Ammerman, where are you employed?

A City Sand and Land Fill.

Q And, what is your occupation?

A Mechanic.

* * * *

[216] Q (By Mr. Leib): Mr. Ammerman, will you tell the Court what your duties are and where you perform those duties as a mechanic?

A Right now I am working at City Sand and Land Fill.

Q Okay. Do you recall the date of May the 14th, 1979?

A Yes, I do.

Q And, on that date were you employed?

A I was employed by City Sand and Land Fill, but I was working in the garage of City Disposal at 1550 Harper.

Q City Sand and Land Fill and City Disposal are owned by the same individual, is that correct?

A Yes.

Q And, they work out of the same office?

A Right.

Q And, so, your place of employment was at 1550 Harper, Detroit, Michigan, isn't that correct?

A Then, yes.

Q All right. Will you tell the Court what your duties were pertaining to making necessary repairs, changing parts, et cetera, having to do with various trucks at 1550 Harper Avenue, Detroit, Michigan?

A I repaired the trucks as they needed it.

Q What type of trucks are these?

A Semis, tandem tractors and trailers. At the time, they [217] were Mack trucks.

Q All right. Now, Mr. Ammerman, on May the 14, 1979, will you tell this Court how many mechanics worked in the garage along with yourself?

A We had two other mechanics working at the time.

Q Will you tell this Court whether you had any authority to hire or fire?

A No.

Q Will you state whether or not you had any authority to direct an individual driver to go home?

A No authority.

Q Do you recall the date of May the 14th, 1979, at approximately 7:30 to 8:00 A.M.

A Yes.

Q On that date, will you tell the Court whether or not Mr. James Brown, if you know, was assigned to drive truck 245?

A Yes, he was.

Q And, were you familiar with the condition of truck 245 on that date?

A Not until he stopped at the garage that morning and told me he was having a problem with the brakes.

Q And, that was approximately what time?

A I would say 7:00, 7:30, somewhere. It was early, his first run.

[218] Q Did you have a conversation with him at that time?

A Yes, I did.

Q What did you tell him and what did he say to you?

A I told him, I said, "The garage is full. I've got trucks backed up. I'm not gone be able to get to it today. The truck is gonna be down. So, you might as well go home or see Otto and see if there's another truck."

Q What, if anything, did he say to you?

A I don't remember him saying anything to me. He went out of the garage area.

Q And, at that time did you have any further conversation with him concerning truck 244 or truck 245?

A No.

Q Are you familiar with the policy of the company with reference to drivers performing work on other than their assigned truck? If it is down for any particular reason?

A Yes. If there's a spare truck, a driver usually will take the other truck.

Q With reference to driving any other truck, on May the 14th, 1979, will you tell this Court who the two supervisors were concerning disposition and driving of various trucks to the land fill?

A Mr. Otto Jasmund and Mr. Madary.

Q Did you have any authority to authorize a driver to drive to any particular place?

[219] A No.

Q Now, at that time when you had your conversation with Mr. Brown, will you state whether or not you advised him to see Mr. Otto Jasmund?

MS. ENGEL: Objection, your Honor.

JUDGE WAGMAN: What?

MS. ENGEL: Mr. Leib is starting to lead his witness.

JUDGE WAGMAN: No. He just said whether or not.

MS. ENGEL: Okay. I will strike my objection.

A Yes, I did.

Q Now, precisely what did you tell him?

A I told him that his truck would be down, he could go home or see Otto as there might be another truck.

Q Do you know whether or not Mr. Brown went to see Mr. Jasmund?

A No, I don't.

Q With reference to breakdown of trucks during the time of your employment, will you state whether or not, or

how frequently trucks are required to be repaired in order to keep the fleet running? And, what the policy is with reference thereto?

A You mean how often a driver has to change a truck or what?

Q Well, whatever is required to keep a truck in good repair. What necessarily do you do in order to keep a truck [220] in good repair and running?

A We have to bring it in and repair it. And, in the meantime the driver either takes another truck or he's off.

Q Now, to your knowledge, Mr. Ammerman, do you know of any instance where the company has required a driver to drive and operate a tractor and trailer that was not in good operating condition?

A No.

Q Do you know of any instance where they have told a driver to drive a truck that was defective?

A No.

Q Now, assume, Mr. Ammerman, that a truck breaks down, as in this particular instance. What would be the policy with regard to any other truck being available?

A The driver would take another truck if there was another truck available.

Q How often is that done?

A All the time. Two or three times a week. Three or four times a week.

Q Whenever the truck is in for repairs he will be assigned another truck?

A If there is one available, right.

Q Mr. Ammerman, when, trucks are brought into the garage, are the chassis examined?

A Yes, sir.

[221] Q Is the transmission examined?

A Yes.

Q Is the differential examined?

A Yes.

Q Are the oil filters replaced, if required?

A On a certain period of basis, yes.

Q Are the wheel bearings taken care of if required?

A If required, the front ones you can see, yes.

Q And, what about the universal joints?

A They are greased and checked.

Q And, the air cleaner?

A Usually changed.

Q What about the shock absorbers?

A Some of 'em have 'em and some don't. If they have 'em, they're checked.

Q And, the springs?

A Visual check, right.

Q What about your tune-ups?

A As needed.

Q Tires?

A That's usually checked. We have a separate department for tires.

Q What about the brakes?

A The brakes, if they need adjusting, the trucks are brought in and the brakes are adjusted.

[222] Q What about the wheel balancing?

A That we send out.

Q And, what about the steering? Or, engine repair or chassis?

A Most of our steering we send out to have done. The engine repair we do ourself.

Q What about the differential?

A That's checked.

Q And, how about the cooling system?

A That's checked.

Q And, the exhaust system?

A That's checked.

Q Batteries?

A If needed. Usually not unless you have a problem, you look at the batteries.

Q These are part of the daily work on the part of the garage mechanics, is that correct?

A That wouldn't be daily on every truck.

Q I understand, but, these are the things that are performed?

A Right.

Q You perform repairs as well, if a car or a truck is involved in an accident? You make necessary repair there as well?

A If it's a small one.

* * * *

[293]

OTTO C. JASMUND,

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

* * * *

[294]

DIRECT EXAMINATION

By Mr. Leib:

Q Mr. Jasmund, where are you employed?

A City Disposal.

Q And, how long have you been employed by City Disposal?

A Approximately about two and a half years.

Q What is your position with City Disposal?

A Supervisor.

Q What are your duties as a supervisor?

A Scheduling truck drivers and oversee the garage.

Q How many trucks, bulldozers and loaders does City Disposal have? Just give an approximation.

A At that time or now?

Q Then or now.

A Approximately 25 or 30 pieces of equipment.

Q Specifically, what does City Disposal do?

A They handle the City of Detroit's rubbish. It is a relay dumping point.

Q And, that dumping point is located where?

A 1550 Harper.

Q Explain to the Court in your own words if the City of Detroit has—let's say they have the rubbish trucks that [295] pick up the rubbish—what do they do with that rubbish?

A The City of Detroit or us?

Q No, the City of Detroit?

A They simply bring it to our relay and dump it and leave.

Q And, when they leave what do your truck drivers do?

A They relay it out to our land fill in Belleville, Michigan.

Q What do they do with it there?

A Dump it in the land fill, leave, and come back for another trip.

Q All right. Now, will you tell the Court whether or not in 1979, specifically in May or thereabouts or before May, whatever it may be, whether or not City Disposal had a garage located on the site of 1550 Harper, is that it?

A That is correct. They did.

Q All right. And, how many mechanics were located in that garage?

A At times two to four.

Q What is the function of the mechanics in relationship to the work required in that garage?

A They simply repair and service a simple maintenance program, other than a major tragedy.

Q Will you tell the Court approximately how many trucks would come in every day for checking, greasing, et cetera?

[296] A Approximately, at that time, service duties were from two to three.

Q Okay. What is a bulldozer?

A It's a crawler type machine.

Q And, what is it's purpose?

A To push rubbish into the building and compact it.

Q And, what is an end loader?

A An end loader is a rubber tire loader with an eight yard bucket on it which loads our open top trucks and also pushes rubbish into the building.

Q Now, your employees in the month of May, okay?

A Yes.

Q You had truck drivers, right?

A Right.

Q Would they drive a tractor?

A Tractor-trailer, correct. Right.

Q Now, will you tell the Court whether or not drivers were assigned to a specific truck?

A Yes, they were.

Q And, tractor and trailer?

A They certainly were.

Q Will you tell the Court whether or not James Brown was assigned a specific truck and trailer, or tractor and trailer?

A Yes, he was.

[297] Q Do you recall the date of May 14, 1979?

A I certainly do.

Q And, on that date will you tell the Court whether or not James Brown was an employee of City Disposal Systems, Inc.

A He was.

Q Will you tell the Court whether or not on May 14, 1979, James Brown was assigned to operate a specific truck?

A He was.

Q What was that truck number?

A 245.

Q Will you tell the Court whether or not on May 14, 1979, whether or not James Brown worked that day?

A He worked that morning.

Q What time, if you know, did he report for work?

A The starting time was around 5:00.

Q In the morning?

A Five, 5:30 the guys left.

Q All right. Will you tell the Court whether or not Mr. Brown returned to the City Disposal Systems, Inc. plant located at 1550 Harper on that date, at any particular time?

A He returned at approximately 7:30, 8:00 o'clock.

Q That's A.M. or P.M.?

A Right, A.M.

Q On that date and time, will you state whether or [298] not you had a conversation with Mr. Brown?

A I did.

Q Will you tell the Court in your own words what was said by Mr. Brown, what you said to him?

A Exact words?

Q Whatever was said. I only ask you to tell the truth, nothing else.

A I'll elaborate. Yes.

Q Go ahead.

A Okay. I came out of my office and Mr. Brown was standing out there. He said he had something wrong with his truck. So, we came to an agreement there was something wrong with his truck, 245.

Q Okay. Go ahead.

A Okay. I told him to take out 244. He refused to take out 244. Told me that Frank Hamilton was coming. As a matter of fact, he knew he was coming. I says to him, "How do you know he's coming in. He never called me. No one else has told me about it." I says, "If any driver is supposed to be on the property they are supposed to notify me." And, that was it. He refused to drive the truck the first time. I asked him for the second time. I said, "Brown, take out the truck." We had garbage all over the place. That was the second time I told him to take the truck out. At that time my co-worker, Mr. Madary, the other supervisor, came out of [299] the back door. It's a raised up back door. We kind of arguing a little bit back and forth. He told Brown, he said, "Take the truck and go on to the land fill." And, Brown, no, he didn't want to take it. He left the property.

Wait a minute. I'll retract that. He punched out before Mr. Madary asked him to take the truck. I'll retract that statement. After the second time I asked him to take the truck. He was in a rage. I was in a rage. he grabbed his timecard. It was right behind him, as close as this wall is to me. He grabbed it out and punched out, and he said, "Hell no, I ain't taking the truck out." And, he left. He left the property on his own accord.

Q Mr. Jasmund, at that time was anything said with regard to truck 244 about defectiveness or otherwise or anything pertaining to truck 244?

A No. We was arguing about Hamilton.

* * * *

[300] Q Were you familiar, Mr. Jasmund with the condition of truck 244?

A Yes, I am.

JUDGE WAGMAN: Were you?

THE WITNESS: Yes.

Q (By Mr. Leib): On May the 14th were you familiar with it?

A Certainly was.

Q Will you tell the Court in your own words what the condition of that truck was as you recollect?

A It was in good shape. It was running fine as far as I'm concerned.

Q All right. On that date and time did the name of Frank Hamilton come up in your conversation?

A Certainly did.

Q What, if anything, did Mr. Brown say in relation thereto?

A Mr. Hamilton?

Q Yes.

A He told me that he knew he was coming to work, that's the reason he didn't want to take his truck. And, I told him he didn't have no business telling me if he knew or not. I [301] don't want to go into our whole argument. I told him simply to drive the truck.

Q As a result of Mr. Brown refusing to drive—

A Yes.

Q Will you tell the Court what, if anything, you did in relation to having anyone else drive truck 244?

A At that time?

Q Yes.

A Nothing at the moment.

Q All right. What did you do subsequently?

A Later on, oh, I'd say maybe 9:00 o'clock, 8:30, 9:00, it might have been 9:00 o'clock, quarter after—

Q What did you do?

A I called John Tyner.

Q Okay. All right. And, who was John Tyner?

A The man that was up on the stand here a little while ago.

Q Okay. What did you have him do?

A I assigned him to truck 244.

Q All right. What, if anything, did he do?

MS. ENGEL: Objection, your Honor.

JUDGE WAGMAN: What?

MS. ENGEL: It's the same one I've been raising all along as to relevance.

JUDGE WAGMAN: No. I want to finish the whole scene. [302] Overruled. Go ahead. What did he do?

THE WITNESS: He came in. Normal procedure. Punched in, filled out his trip sheet, went to the truck, checked it out; checked the water, the oil, whatever had to be checked. It was already loaded. I think at that time he had a tarp on there, he tarped it off and went to the land fill. Came back, the same thing, went to the land fill a second time. Came back, the same thing, went to the land fill a third time. And, never reported any breakdowns, any failures to me.

Q (By Mr. Leib): Now, how far is this land fill from 1550 Harper?

A Approximately 37 miles.

Q And, how many roundtrips did he make?

A Three.

* * * *

[303] Q (By Mr. Leib): Mr. Jasmund, following that notice of voluntary quit, will you tell the Court whether or not a grievance was filed by Mr. Brown?

MS. ENGEL: Objection.

JUDGE WAGMAN: What is that?

MS. ENGEL: Relevance. I know it is the same one as before.

JUDGE WAGMAN: You are overruled. You have a continuing objection. Ask him about that.

[304] Q (By Mr. Leib): Was a grievance filed by Mr. Brown?

A Yes.

Q And, were you served—tell the Court whether or not you were served with a copy of that grievance?

A Personally?

Q No. Did the Company receive it.

A The Company received it in the mail.

Q All right. And, following that grievance report, will you tell the Court whether or not there was any communication with Local Union Number 247 concerning that grievance?

A John Calandra contacted myself.

Q And, who is John Calandra?

A The fellow that was on the witness stand earlier.

Q One of the business agents for 247?

A James Brown's business agent.

Q Okay. Tell the Court in your own words what happened, what your position was, what their position was, what the final outcome was.

A I'll tell you what happened at our meeting. But, I can't tell you what happened at the union. Of course, I don't know.

Q All right.

A They brought it to our attention. They brought it down and we had a meeting on it. I talked to John Calandra, [305] about it, and he said that—this is his words, "James Brown left the property voluntarily, without me telling him anything, any accord like that was an automatic voluntary quit."

* * * *

[331] [April 17, 1980 session]

CONTENTS

<i>Witnesses</i>	<i>Direct</i>	<i>Cross</i>	<i>Redirect</i>	<i>Recross</i>
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[332] OTTO C. JASMUND

having been previously duly sworn on behalf of the respondent, resumed the stand, was examined and testified further as follows:

JUDGE WAGMAN: Mr. Leib[b], do you have any other questions?

MR. LEIB: Just a few.

DIRECT EXAMINATION, Cont'd

* * * *

Q (By Mr. Leib) Concerning the date of May 14, 1979, you stated that Mr. Brown punched out.

[332] A Yes.

Q And left. Now at that time where was truck 244?

A It was parked in the yard alongside of the garage.

Q How far away is that from the office where he punched out?

A It is not that far. About—

Q How far is not that far?

A A hundred fifty yard, maybe. A hundred yard.

Q That's the normal place where the truck was parked?

A Thereabouts.

[333] Q Will you state whether or not prior to the incident in question, you instructed Mr. Brown to take out truck 244, and will you tell the court in your own words whether or not at any time Mr. brown ever went to truck number 244?

MISS ENGEL: Objection, your Honor.

Q (By Mr. Leib) What, if anything, did he do?

A I never saw him go near the truck.

MR. LEIB: No further questions.

JUDGE WAGMAN: Okay. Cross examine.

CROSS EXAMINATION

Q (By Miss Engel) Mr. Jasmund, I believe you stated in your direct testimony that drivers are paid in two ways at City Disposal, is that correct?

A That's correct.

Q You said they are paid either hourly or by some form of incentive pay, by the load, is that correct?

A Yes, it makes the guys want to work more.

Q Mr. Brown was paid by incentive pay, wasn't he?

A Yes, he was.

Q That was his choice, wasn't it?

A Yes, it was.

Q As a matter of fact, didn't Mr. Brown make more money than most of the other drivers?

A I couldn't say that for sure.

Q You never saw the pay check for the drivers?

[334] A Yes, I did.

Q Did you approve their hours?

A I did.

Q So you must have some idea how much he made as compared to others?

A Some idea, yes.

Q And didn't Brown make more than most of the other drivers?

A At times.

Q Now other drivers, not all the drivers chose incentive pay, did they?

A State that again?

Q Not all the drivers chose incentive pay, to work by incentive pay, did they?

A No, they didn't.

Q Just some?

A That's right.

Q And Mr. Brown was one of those?

A That's correct.

Q Now didn't the drivers on incentive pay like to pull more loads because they made more money?

A No.

Q Well, what was the point in having incentive pay then?

A The point of it, some drivers prefer to only pull as many loads as they wanted to. It wasn't just to make more money. It was up to the individual.

[335] Q Okay, but isn't the basic purpose of incentive pay to give incentive to earn more money and pull more loads?

A That's the purpose of it, right.

Q Now if a driver punched out and went home, he wouldn't get paid for the time he was off, would he?

A From the time he left the property?

Q Yes.

A How could he?

JUDGE WAGMAN: The answer is yes or no.

THE WITNESS: Well, sir, yes.

Q (By Miss Engel) Once he punches out—let's say you are a driver and you punch out, you do not make any money that day, is that correct?

A That's right.

Q Tell me if Mr. Brown refused to drive and punched out, he wouldn't make any money that day, would he?

A He got paid for the load he pulled.

Q Yes, but after he punched out, say eight in the morning or eight thirty?

A No, not paid. It is possible he could be—he wouldn't make anything.

* * * *

[346]

JUDGE WAGMAN: What is the requirement for a driver to check out, have a pre-drive check out in the morning with re(s)pect to brakes?

THE WITNESS: To check his brakes.

JUDGE WAGMAN: Would the driver determine the safety of the brakes?

THE WITNESS: Yes. Okay. You want me to explain it?

JUDGE WAGMAN: Sure. That's what I am asking.

THE WITNESS: He would go to his truck and give it an oil check, and he will get in his truck and before he is out of the yard he will have to touch the brakes a couple of times and when he comes to the end of the yard to enter into the street, he almost has to stop completely because there is a down hill there, and if he hasn't any brakes, he is going to know it right away. It is as simple as that. Just like driving your car. You come to the back of your driveway you apply the brakes to stop and look, and you know if you have got brakes or not.

JUDGE WAGMAN: What did Mr. Brown do in that regard on [347] May 14th?

THE WITNESS: He was never in the truck.

* * * *

ROBERT MADARY

a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Leib) Your name is Robert Madary?

A Right.

Q Where are you employed, Mr. MaDary?

A City Disposal Systems.

Q And in what capacity are you employed?

[348] A Supervision.

Q How long have you been so employed?

A Mr. Sove bought it in 1975.

Q Have you been employed since 1975?

A Since 1975.

Q In a supervisory position?

A No, sir.

Q when did you become a supervisor, to the best of your recollection?

A The latter part of '77.

Q What were your duties as a supervisor and what are your hours of employment?

A As supervisor?

Q Yes.

A From seven in the morning until seven at night.

Q What are your duties?

A To work with Mr. Jasmund.

Q What do you do?

A Dispatch drivers, check on the garage, check on the garbage.

Q Mr. Madary, do you recall the date of May 14, 1979?

A I do.

Q Will you tell the court whether or not you were on the premises of City Disposal Company on that date?

A I was.

[349] Q Do you recall whether or not there was a conversation overheard by you between Otto Jasmund and Mr.

James Brown on May 14, 1979, at approximately between seven and eight o'clock in the morning?

A I did.

Q Tell the court, in your own words, what, if anything, you observed, what you heard and what took place between Mr. Brown and Mr. Jasmund?

A I was sitting in the back office, right off the driver's room, Otto and Mr. Brown was in a heated argument over the trucks. This 245 wasn't working right and they took 245 back in the garage evidently, from what I could hear from the argument. There was a discussion. He wanted—they were discussing his truck. Mr. Jasmund asked him to drive this 245 and they were still in a heated argument, and I am standing on the plateau out there. By that time I am standing up on the steps over there, and Mr. Jasmund asked Mr. Brown to drive truck 244. Mr. Brown stated that Mr. Hamilton was coming in and they were still arguing this and that, and, you know, this and that, and I am going home. You know what I mean? At that time during that argument sometime or another he punched his card after he talked to Otto and after he punched his card, I went over, knowing Mr. Brown, and asked him why don't you go drive 244 today, we have got a lot of garbage and he said I am [350] it.[sic] Mr. Brown proceeded to go home.

Q At that time, Mr. Madary, will you tell the court whether or not Mr. Brown went over to truck 244 and examined truck 244?

A As far as I know, Mr. Brown left the property.

JUDGE WAGMAN: Wait a minute. I am interested in getting the answer. Are you happy with that answer? You asked him did he go and take a look at 244, and he said he left the property. He left the property. Did he go to 244 to look at it before the [sic] left the property?

THE WITNESS: 244 sits away back in the yard. Our office is away up in the front. We have right around seven acres. Mr. Brown walked out the front of the yard. To my knowledge, Mr. Brown did not go back and look at the truck unless he went down the railroad track and came back in there and looked at 244.

JUDGE WAGMAN: That's all I wanted to know.

* * * *

[351] Q (By Mr. Leib) Tell the court in your own words, what did you do?

A When they got in this heated argument, I was standing [352] on this plateau, and they were still in this heated argument. Mr. Jasmund asked Mr. Brown to drive 244. Mr. Brown stated Hamilton was coming to work that day and they were still in an argument and Otto asked him, and he said I am not driving it, and he punched that card out. You know what I mean. After he punched the card out, I asked Mr. Brown go drive the truck and he says he is not driving it. He was going home.

Q And that was it?

A It was just that simple.

Q Mr. Madary, are you familiar with the incentive system, how it works?

A I certainly am.

Q Explain it for the court.

A The incentive system works with the drivers like this. They haul by the load or by the hour, but they take whichever is greater, because we have to pay, you know what I mean. If a driver goes down while he is hauling incentive pay, he gets down time. With his load incentive, sometimes he makes incentive because we have got a run, you know what I mean, but he always gets what is the greatest. The reason we do this, an employee has to work eight hours a day, according to our union contract, and an incentive driver can come and do this in six and a half hours and get paid for eight and a half hours and he can be home two hours [353] and still be getting paid by City Disposal. The incentive pay goes—I don't know the rate right to the penny but I do know the incentive now is twenty two, twenty two, twenty two, twenty six, twenty eight, because he gets into time and a half after the first load, and the reason the guys like incentive pay, we let them run a few extra loads, but they do get whatever is the greatest. If a guy comes and hauls one load, you know what I mean, and an incentive driver, Mr. Brown had chosen to stay on the other part of that day, City Disposal had no alternative but to pay him his six hours pay. If he had not refused to stay,

Mr. Jasmund would have found something for Mr. Brown to do on that property, according to our contract.

JUDGE WAGMAN: If he hadn't punched out?

THE WITNESS: If he hadn't punched out that day, he would have got paid. If he drove 244 or whatever truck it would have been, Mr. Brown would have got paid, and Mr. Brown has enough intelligence to know that.

JUDGE WAGMAN: Anything further?

Q (By Mr. Leib) Would you tell the court, Mr. Madary, whether or not there was a distinction between truck 245, which was assigned to Mr. Brown, and the other trucks?

A Mr. Brown basically drove truck 245. Drivers feel when they get into a truck, that is their truck, naturally, and at times it will run along and everything will be going [354] smooth, and every one will keep their truck. The only confusion comes in, when a driver's truck is down, we have to assign him to another truck. We don't have no choice. We don't have a fleet of spare drivers and because the DNR and the City of Detroit and Wayne County, we have to move the garbage. It has to be moved. We can't leave the garbage outside of the building. It has to be moved, and a driver gets a little teed when he has to go on another truck, but they basically know they have to drive other trucks at times.

MR. LEIB: You may take the witness.

CROSS EXAMINATION

Q (By Miss Engel) Mr. Madary, you just stated that you have to move the garbage out of the yard?

A Yes, Ma'am.

Q And you are required to do that by the DNR, the department of natural resources, and the City of Detroit?

A And Wayne County.

Q And Wayne County. Then there is quite a bit of pressure on the company to make sure the garbage is being moved out of the yard regularly, is that correct?

A At times.

Q In May, in fact on May 14th, wasn't there quite a bit of garbage piled up?

A There was.

* * * *

[357] (By Miss Engel) So while Mr. Brown was assigned truck 245, he did drive other trucks at times, is that right?

A I do believe he did.

* * * *

Q (By Miss Engel) Had you ever made assignments in the past?

A Have I?

Q Yes.

A If one of my supervision or somebody didn't show up, I would make the assignments.

Q Had you ever assigned Mr. Brown to drive a truck in the past.

A I might have.

Q Do you recall his ever refusing to drive a truck before? You don't recall his refusing to drive a truck before, do you?

[358] A Well, I am trying to answer the question.

Q Isn't that right?

A I would say that Mr. Brown was in love with 245.

JUDGE WAGMAN: Is your answer he refused at other times?

THE WITNESS: Yes, he refused.

Q (By Miss Engel) You personally—you just stated, Mr. Madary, that you are not sure if you ever assigned him another truck.

A I can't recall, but—

Q You can't recall?

A No.

Q You can recall that he refused?

A He refused.

Q Well, how can you—you deny or you say he refused, yet you say you don't recall ever assigning him a truck.

A May I explain to you and the court?

Q Yes. You said every one has a particular assignment to their own truck, is that right?

A They have a particular fondness of the truck they are assigned to.

Q And Mr. Brown was not unusual in that regard, was he?

A He was not unusual in that regard.

* * * *

[363] Q Now are you saying you repair a truck if there is no problem with it?

A We repair a truck if there is a problem. We do that.

Q You repair something if there is nothing wrong with it?

A We have mechanics to do that.

Q They repair things that are all right?

A They repair things that are all right because of the driver telling them—

JUDGE WAGMAN: Wait.

MISS ENGEL: Your Honor—

JUDGE WAGMAN: The answer is yes.

MR. ENGEL: That's all.

REDIRECT EXAMINATION

Q (By Mr. Leib) Mr. Madary, will you explain yourself?

A A driver with drive [*sic*] the City Disposal and come in and tell one of my mechanics the brakes are no good, they are overheating and he ain't got enough air. My mechanics are instructed to take the truck for a ride. The mechanic knows if you have got some adjustment left on the brakes, it is there, and the mechanic is not always smarter than a driver, but he has to find the problem. The driver will come in and tell me there is something wrong with the truck. Park the truck just so he can go home, and leave something on the bulletin board at times when there is physically nothing wrong with the truck. I have had that happen to me. [364] Many times they will come right back in and go to work the next morning and my mechanic was looking for nothing.

Q Mr. Madary, with reference to these repair orders on truck 244, any other records pertaining to any repairs or work on truck 244 other than this pile that was given to me?

A I have looked in every box, every record I can humanly find in that garage, and if I had anything on 244 pertaining to this case.

Q Other than these?

A Other than them. I wouldn't know where to look. I might find something but I wouldn't know where to look.

JUDGE WAGMAN: That's all you could find?

A THE WITNESS: That's all I could find.

Q (By Mr. Leib) You spoke of a minor thing being recorded. What did you have reference to?

A No blinkers, no lights on the trailers, and mud flap missing, possibly an air leak that is minor.

Q Therefore you wouldn't make a record such as that?

A Would not make a record. My mechanic would be sitting there making records all day long.

MR. LEIB: That's all.

JUDGE WAGMAN: Anything else?

MISS ENGEL: Mr. Madary, you referred to a brake adjustment as a minor job, didn't you?

THE WITNESS: It is a minor job and major.

[365] JUDGE WAGMAN: It can be both.

THE WITNESS: If it is a major, it is a major. If it is just a minor—you could go to the gas station and all the man takes is a wrench and tighten your brakes in a matter of minutes. It is not a matter of weeks.

MISS ENGEL: A problem with the brakes might not be reflected in these exhibits 9(a) through (p), is that correct?

THE WITNESS: It is possible.

* * * *

KEITH W. HALL

a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

JUDGE WAGMAN: Speak up good and loud.

DIRECT EXAMINATION

Q (By Mr. Leib) Your name is what?

A Keith William Hall.

Q Where are you employed, Mr. Hall?

A I am employed by City Sand and Land Fill.

Q In what capacity are you employed?

A As a mechanic, master mechanic.

[366] Q Where do you work?

A At City Disposal.

Q Where at City Disposal?

A In the garage.

Q That is located where?

A 1550 Harper, as our relay station.

Q Is that in the city of Detroit?

A It is in the city of Detroit.

Q What are your duties, Mr. Hall, and before you answer that, when did you first become employed?

A By whom?

Q Either one or both?

A At City Sand I started in 1975; when it was owned by Sandtest, and later that year City Disposal bought the property, bought the business.

Q That was in what year?

A 75.

Q And you continued on?

A Yes, I did.

Q Did you have a specific designation?

A Yes, mechanic.

Q What was that?

A Mechanic.

Q What are your duties?

A To repair and maintain the equipment on the property.

* * * *

[375] Q Tell the court in your own words what, if any thing, you heard stated between Mr. Brown and Mr. Ammerman?

A Mr. Ammerman informed Mr. Brown that his truck would be down for the day and he should go see Mr. Jasmund and see if he could be assigned to another truck.

Q What, if anything, did Mr. Brown say then?

A Mr. Brown informed Mr. Ammerman that 245 was his truck, and that he had—he had—he was told he would not have to drive any other truck other than that, because his truck was a special unit, referring to the trailer that he was hauling.

Q And any particular meeting?

A He said he had a meeting with Mr. Sove.

Q That he didn't have to drive any other truck?

A He would not have to drive, in his terms he would not have to drive a long trailer.

Q That's what he stated?

A That's what Mr. Brown stated.

Q Now did you over hear the conversation of Mr. Ammerman [376] instructing him to see Mr. Jasmund?

A Yes.

* * * *

JUDGE WAGMAN: Wait. Give us everything you can remember that went on between Mr. Ammerman and Mr. Brown.

THE WITNESS: Mr. Ammerman, like I stated, told Mr. Brown to see Mr. Jasmund. To say exactly what they said, I don't know, but as a fact he was informed his truck would be down for the rest of the day and there may be another truck available.

JUDGE WAGMAN: What did Mr. Brown say?

THE WITNESS: He didn't want to drive another truck, that his unit—the truck that he drives is actually faster and he was able to make more money with his truck and he didn't want to drive another truck because it involved more work, and Mr. Ammerman told him to see Mr. Jasmund.

JUDGE WAGMAN: What, if anything, did Ammerman say about, you know, what he should do? Anything else? What, if any, other suggestion did Ammerman make to Mr. Brown in that conversation about what he should do the rest of the day?

THE WITNESS: Okay.

[377] JUDGE WAGMAN: Do you remember that?

THE WITNESS: There was something.

JUDGE WAGMAN: What did he say?

THE WITNESS: He said well why don't you just go home, which was in response to what most mechanics would tell a driver. In other words, get out of here, out of my sight because Mr. Brown was excited.

Q (By Mr. Leib) All right, now you heard the conversation where he was told to see Otto Jasmund?

A Yes, I did.

* * * *

Q (By Mr. Leib) Mr. Hall, will you describe the type [378] of equipment, tractor 245 and the trailer attached thereto, assigned to Mr. Brown?

A All right, 245 pulls a trailer known as a wood box. It is somewhat smaller than our regular trailers.

Q What about maneuverability?

A It is easier to maneuver in the yard and in the dump and it unloads itself faster.

Q And as a consequence thereof, what is your opinion as to the number of loads a driver of this type of equipment, as compared to the other tractors and trailers, would be able to drive?

MR. ENGEL: Objection.

MR. LEIB: I am simply asking for a comparison.

JUDGE WAGMAN: There is an objection. What is it?

MISS ENGEL: I don't think the witness is competent to answer that. He is a lay witness and not an expert in the situation.

JUDGE WAGMAN: On cross examination you can go into that. This is his view, based on his experience. as a mechanic.

MISS ENGEL: Oh, yes, I understand that.

THE WITNESS: I used to drive a truck.

JUDGE WAGMAN: Go ahead and give your best answer.

THE WITNESS: Let's hear the question all over again.

Q (By Mr. Leib) You stated, as I best recall, that Mr. [379] Brown was assigned a smaller light trailer, wooden box and so forth.

A Yes, that's right.

Q And taking the one that was assigned to him, this particular trailer, tractor trailer, would require him to use tarpons?

A Not at that time.

Q And as a consequence thereof was this tractor trailer lighter or heavier than the others?

A A lot lighter.

MISS ENGEL: Objection. I don't know what this has to do with the case, the weight of the truck.

JUDGE WAGMAN: He was there and observed. You can ask him questions.

THE WITNESS: Do you mean do they have the weight on the truck?

JUDGE WAGMAN: I thought a truck had printed on the side the—

THE WITNESS: The gross weight?

JUDGE WAGMAN: Its loaded weight, unloaded weight.

THE WITNESS: Gross vehicle weight.

Q (By Mr. Leib) Are you familiar with the gross weight?

A It is stated on the license plate. I don't recall exactly what is stated on its plate.

Q Incidentally, did you drive at any time during your [380] career?

A Yes.

Q As a truck driver?

A Yes.

Q Where?

A For Ace Construction Equipment.

Q What type of equipment did you drive?

A Semi type equipment.

Q Similar to the one involved here?

A Yes.

Q How many miles would you have driven?

A Thirty or forty thousand miles.

Q Mr. Hall, with regard to maneuverability of tractor 245, can you explain to the court the distinction between 245 and the other tractors, with special emphasis with regard to maneuverability?

MISS ENGEL: Objection.

JUDGE WAGMAN: On what ground?

MISS ENGEL: First of all, it is leading.

JUDGE WAGMAN: No. He asked him to talk about maneuverability. He didn't tell him, you know—he just asked him about the topic of maneuverability.

MISS ENGEL: Second of all, I don't think he is competent to discuss that.

JUDGE WAGMAN: If he doesn't know, he is going [381] to tell me he doesn't know, and if he has some knowledge

he can tell us, and you will have an opportunity to cross examine. Proceed.

THE WITNESS: Okay. The wooden box trailer behind 245, is a shorter trailer. It is easier to maneuver around the dump. It is lighter, and has tighter turning radius, all of which are helpful in a land fill situation, because you have an extremely small area to unload your refu[s]e.

Q (By Mr. Leib) Now in regard to dumping loads of this type, this particular type of equipment that was assigned to Mr. Brown, tell the court in your own words, it is easier, faster, slower, et cetera? Just explain that?

A It was definitely faster because he did not have a trap. He was topped off with dirt which didn't require him to climb up on the trailer and roll back the tarp, and the dumping process was a lot faster. 245 wood box is a d[um]pster. Lift cylinders picks the box up and the load slides out. The long trailers are ejection type trailers with a large ramp in; the front of the trailer, which pushes the garbage out and those trailers are tarped, and it requires time at the dump to roll the tarps back and secure them.

* * * *

[GC Exhibit 2]

THIS AGREEMENT, made and entered into this 1st day of November, A.D., 1977, by and between CITY DISPOSAL SYSTEMS, INC. located at Detroit, Michigan, party of the first part, and hereinafter termed the Employer, and Local Union No. 247, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, located at 2741 Trumbull Avenue, Detroit, Michigan, party of the second part, hereinafter called the Union.

WHEREAS, both parties are desirous of preventing strikes and lockouts and other cessations of work and employment; and of maintaining a uniform wage scale, working conditions and hours of employees of the Employer; and of facilitating peaceful adjustment of all grievances which may arise from time to time between the Employer and his employees; and of promoting and improving peaceful industrial and economic relations between the parties;

* * * *

ARTICLE VIII

ARBITRATION AND GRIEVANCE PROCEDURE

Section 1. It is mutually agreed that all grievances, disputes or complaints between the Company and the Union, or any employee or employees, arising under the terms of this Agreement shall be settled in accordance with the procedure herein provided and that there shall at no time be any strikes, lock-outs, tie-ups of equipment, slow-downs, walk-outs or any other cessation of work except as specifically agreed to in other superseding section of this Contract.

Every effort shall be made to adjust controversies and disagreements in an amicable manner between the Employer and the Union. In the event that any grievance cannot be settled in this manner, the question may be submitted by either party for arbitration as hereinafter provided.

Section 2. (a) Should any grievances, disputes or complaints arise, there shall be an earnest effort on the part of the parties to settle such promptly through the following steps:

Step 1. By conference between the aggrieved employee, the shop steward, or both, and the foreman of his department.

Step 1-a. Before proceeding to Step 2 below, it shall be the responsibility of the aggrieved to reduce any grievance to writing on the regular grievance form provided for by the Local Union.

Step 2. By conference between an official or officials of the Union and the manager, or representative of the company delegated by the manager, or both.

Step 3. In the event the last step fails to settle the complaint, it shall be referred to the Board of Arbitration upon the request of either party. The President and/or Executive Board of the Local Union shall have the right to determine whether or not the grievance is qualified to be submitted for arbitration by the Union.

(b) The Board of Arbitration shall consist of one (1) person appointed by the Union and one (1) person appointed by the employer. In case of disagreement, a third member shall be chosen by members of the Board of Arbitration.

Either party may submit a list to the other; said list to contain the names of responsible citizens, any of which shall be capable of handling an arbitrati[on]. The parties shall select one (1) individual from the lists and that person shall act as the third member of the Board of Arbitration. If the parties fail to agree on the third member, they shall request jointly from the Federal Mediation Service a list of five (5) prospective arbitrators. Each party shall then alternately strike a name from said list until four names have been removed. The one remaining shall be the person selected to act as the third member of the Board of Arbitration.

A majority decision of the Board of Arbitration shall be rendered without undue delay and shall be final and binding on both parties.

The Board of Arbitration shall have the sole and exclusive power and jurisdiction to determine whether or not a particular grievance dispute or complaint is arbitrable under the terms of this Agreement. In the event that it is determined that such grievance, dispute or complaint is not

arbitrable, the Union shall have the right to strike in support of its position of all such non-arbitrable matters.

(c) Written grievances must be taken up promptly and no grievance will be considered or discussed which is presented later than thirty (30) days after the employee and the union have had actual knowledge of the contract violation.

Section 3. It is further agreed that in all cases of any unauthorized strike, slow-down, walk-out, or any unauthorized cessation of work that the Union shall not be liable for damage resulting from such unauthorized acts of its members. While the Union shall undertake every reasonable means to induce such employees to return to their jobs during any such period of unauthorized stoppage of work mentioned above, it is specifically understood and agreed that the Company, during the first twenty-four (24) hours of such unauthorized work stoppage, shall have the sole and complete right of reasonable discipline short of discharge. Such employee shall not be entitled to, or have any recourse to, any other provisions of this Agreement.

Section 4. After the first twenty-four (24) hour period of such stoppage, however, the Company shall have the right to immediately discharge any employee participating in any unauthorized strike, slow-down, walk-out, or any other unauthorized cessation of work, and such employee shall not be entitled to, or have any recourse to, any other provisions of this Agreement.

Section 5. Should either party not accept and abide by the procedure set forth in this Article, or the decisions resulting therefrom, then, in such instance, any provisions of this Contract notwithstanding, the party violating the terms of this Article shall be denied the benefits of this Article.

* * * *

ARTICLE XI

LIMITATIONS OF AUTHORITY AND LIABILITY

Section 1. No employee, union member or agent of the Union shall be empowered to call or cause any strike, work stoppage or cessation of employment of any kind whatso-

ever without the expressed approval of the Executive Board of the Local Union through its President. The Union shall not be liable for any such activities unless expressly so authorized.

Section 2. Any individual employee or group of employees who willfully violate or disregard the arbitration and grievance procedure set forth in Article VIII of this Agreement may be summarily discharged by the Employer without liability on the part of the Employer or the Union.

Section 3. The authority of the Union stewards shall be limited to acts or functions which said stewards are expressly authorized to perform by the Executive Board of the Local Union.

* * * *

ARTICLE XXI EQUIPMENT, ACCIDENTS AND REPORTS

Section 1. The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with the safety appliances prescribed by law. It shall not be a violation of this Agreement where employees refuse to operate such equipment unless such refusal is unjustified.

Section 2. Under no circumstances will an employee be required or assigned to engage in any activity involving dangerous conditions of work or danger to person or property, or in violation of an applicable statute or court order, or governmental regulation relating to safety of person or equipment.

Section 3. Any employee involved in any accident shall immediately report said accident and any physical injury sustained. When required by his Employer, the employee, before starting his next shift, shall make out an accident report, in writing, on forms furnished by the Employer and shall turn in all available names and addresses of witnesses to any accidents. The employee shall be paid for all time involved in completing accident reports. Failure to comply with this provision shall subject such employee to disciplinary action by the Employer.

Section 4. Employees shall immediately, or at the end of their shift, report all defects of equipment. Such reports shall be made on a suitable form furnished by the Employer and shall be made in multiple copies; one copy to be retained by the employee. The Employer shall not ask or require any employee to take out equipment that has been reported by any other employee as being in an unsafe operating condition until same has been approved as being safe by the mechanical department.

When the occasion arises where an employee gives written report on forms in use by the Employer of a vehicle being in an unsafe working operating condition, and receives no consideration from the Employer, he shall take the matter up with the officers of the Union who will take the matter up with the Employer.

Section 5. Where new types of equipment for which rates of pay are not established by this Agreement are put into use within operations covered by this contract, rates governing such operations shall be subject to negotiations between the parties. Rates agreed upon or awarded shall be effective as of date equipment is put into use.

Section 6. The Employer shall install heaters, defrosters and windshield washers on all trucks and tractors and keep same in an operating condition.

* * * *

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GRIEVANCE REPORT

TRANSFER LOCAL No. 347

Date 5-15-79

Name James R. Brown Company Working for CITY DISPOSABLE SYSTEMS INC
 Street 18134 Rio Delo
 City or Post Office DETROIT MICH 48207
 Residence Phone No. 853-8225
 How Long Employed 2 yrs. 6 mos. Address 1550 HARPER
 Classification Driver Telephone No. 913-3700
 Rate per hour 1.650
 Supervisor's Name M. Hill

On 5-14-79 I received a voluntary quit notice for discharge of Order (refused to drive truck # 244)

I do not think this is justified, I was told first by the head of the mechanical dept. that my truck # 245 would be down for the rest of the day, and for me to go home. I was then told by the supervisor in front of witnesses by other employees that my truck was down for me to go home, later he told me if I wanted to take truck # 244 I told him no.

Truck # 244 was reported by the supervisor down as being repaired. On 21 rec'd of the fact. Truck # 244 was repaired but working day, and has not been repaired.

There is no pay rate or classification for this new equipment in the contract governing such equipment on 21 rec'd.

Date Reported to Steward:

5-14-79

Signed By:

James R. Brown

How Handled:

APPENDIX A

City Disposal
City Sand and Landfill, Inc.

1880 Harper

Detroit, MI 48211

Office 823-3288

Landing Site 491-0888

NOTICE TO EMPLOYEE OF FOLLOWING

WARNING NOTICE

LAY-OFF NOTICE

DISCHARGE NOTICE

VOLUNTARY QUIT

RE: CALL BACK TO WORK

EMPLOYEE'S NAME JAMES BROWN DATE: 5-14-79On 5-14-79 you violated the following company rule (specify violation):
 (DATE)

DISOBEYING OF ORDERS (REFUSED TO
DRIVE # 244)

Your conduct was not in keeping with efficient operation and we therefore
 find it necessary to _____

VOLUNTARY QUIT

NATIONAL LABOR RELATIONS BOARD

7-CP-16793

Docket No.

OFFICIAL EXHIBIT NO.

R-10

Dispositive

Mr.

E.

Special

In the matter of

Date 5-16-79

Witness

Reporter

Page: 13

RECEIVED FOR FILING
OFFICIAL EXHIBIT NO. 1

Disposition: Received
Recorded: FILED

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

No. Page: /

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

BY James S. Thorburn
DEPUTY COUNTY CLERK

PEOPLE OF THE STATE OF MICHIGAN

vs.

No. CR 69-5788

JAMES RICHETT BROWN

Respondent

JUDGE'S STATEMENT

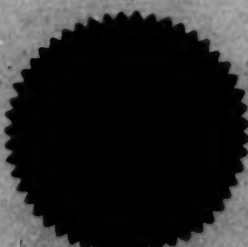
The above named respondent, JAMES R. BROWN, was found guilty by jury of the crime of UTTERING AND PUBLISHING and was on this date sentenced by this court to a minimum term of Two and one-half (2-1/2) years and a maximum term of Fourteen (14) years, with a credit of 90 days as a deduction from the minimum and maximum term for the time the respondent was incarcerated in the Oakland County Jail. This sentence is to be served in the State Prison of Southern Michigan at Jackson, Michigan.

The court made no recommendation as to the release of the respondent after the expiration of his minimum term.

Copy of Probation Officer's report is attached hereto.

James S. Thorburn
James S. Thorburn, Circuit Judge

Dated: April 30, 1970



STATE OF MICHIGAN }
COUNTY OF OAKLAND } SS.

I, LYNN D. ALLEN, County Clerk for the County of Oakland, do hereby certify that the foregoing is a true and correct copy of the original and having a Seal, hereby certify that said is a true copy.

I, James S. Thorburn, I have personally met and heard the respondent and the Seal of said Court this April 30, 1970

LYNN D. ALLEN, Clerk Register of Deeds

By: James S. Thorburn Deputy Clerk

Supreme Court of the United States

No. 82-960

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

CITY DISPOSAL SYSTEMS, INC.

ORDER ALLOWING CERTIORARI. Filed March 28, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

No. 82-960

Office-Supreme Court, U.S.
FILED

MAR 4 1983

ALEXANDER L. STEVENS,
CLERK

IN THE

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CITY DISPOSAL SYSTEMS, INC., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI**

KENNETH J. McINTYRE
DICKINSON, WRIGHT, MOON,
VAN DUSEN & FREEMAN
800 First National Building
Detroit, Michigan 48226
(313) 223-3500
*Counsel for Respondent
City Disposal Systems, Inc.*

**COUNTERSTATEMENT OF
THE QUESTION PRESENTED**

Whether the Board erred in concluding that an employee's individual refusal to perform assigned work which he claims, without substantial objective evidence, to be unsafe for him personally, in the absence of any grievance under or reference to a collective bargaining agreement, as well as in the absence of any involvement of his union or of other employees, is "concerted" activity protected by Section 7 of the National Labor Relations Act, 29 U.S.C. § 157.

(III)

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IN THE

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CITY DISPOSAL SYSTEMS, INC., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI**

Respondent City Disposal Systems, Inc.¹ respectfully requests that this Court deny the National Labor Relations Board's Petition for a Writ of Certiorari in this case seeking review of the Judgment of the United States Court of Appeals for the Sixth Circuit entered on July 22, 1982.

¹ Respondent City Disposal Systems, Inc., a Michigan corporation, has no parent corporation, non-wholly owned subsidiaries, or affiliates.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit (Petition, App. A, 1a-5a) is reported at 683 F.2d 1005 (6th Cir. 1982). The Decision and Order of the National Labor Relations Board (Petition, App. C, 7a-21a) is reported at 256 N.L.R.B. 451 (1981).

JURISDICTION

The jurisdictional requisites are correctly summarized in the Petition. Respondent does not question the jurisdiction of this Court.

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act (the "Act"), 29 U.S.C. § 157, provides in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

Section 8(a) of the Act, 29 U.S.C. § 158(a), provides in pertinent part:

It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7

Section 203(d) of the Act, 29 U.S.C. § 173(d), provides as follows:

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over

the application or interpretation of an existing collective bargaining agreement

Section 301(a) of the Act, 29 U.S.C. § 185(a), provides as follows:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

COUNTERSTATEMENT OF THE CASE

Respondent makes the following additions or clarifications to Petitioner's statement of the factual and procedural background of this case:

1. Employee James Brown's refusal on Monday, May 14, 1979 to operate truck 244 as assigned by Respondent was assertedly based upon a brake problem truck 244 had had two days earlier on Saturday, May 12, 1979 (Petition, App. A, 2a; App. C, 13a). However, when truck 244's brake problem was discovered on Saturday, May 12, 1979, Respondent's mechanics stated in Brown's presence that the brake problem "would be fixed over the weekend or by the first thing Monday morning" (Petition, App. A, 2a). Significantly, the record is devoid of any evidence that from Friday, May 12, 1979 (when the brake problem was discovered) until Monday, May 14, 1979 (when Brown refused to operate truck 244), Brown ever looked at, inspected, tested, or in any fashion investigated to see whether truck 244's brakes had been repaired as the

mechanics said they would be. After Brown's refusal, another driver operated truck 244 without incident (Petition, App. C, 19a).

On this record, the Administrative Law Judge nevertheless held that on May 14 Brown had an "honest belief that the brakes on truck 244 were inadequate" based upon the problem that existed on May 12, and even placed added reliance on the fact that Respondent had not, "by either word or demonstration," undertaken to disprove Brown's claim (Petition, App. C, 19a). Neither the Board's Decision and Order (Petition, App. C, 7a-8a) nor the Opinion of the Sixth Circuit Court of Appeals (Petition, App. A, 1a-5a)² addressed Respondent's challenge that no substantial objective evidence supported the ALJ's finding that, under these factual circumstances, Brown had a reasonable and honest belief that truck 244's brakes were unsafe.

2. Brown's refusal to operate truck 244 was an individual act based upon his statement that the truck "has got problems and I don't want to drive it" (Petition, App. C, 13a). "There is no evidence in the record that he asserted an interest on behalf of anyone other than himself. Brown did not attempt to warn other employees not to drive the truck he believed to be unsafe. . . . Likewise, Brown did not go to his union representative in an effort to avoid driving the truck he considered unsafe" (Petition, App. A, 4a). After his refusal, he simply "went home" (Petition, App. C, 14a). Although Brown filed a grievance through his union *after* his employment was terminated, the record is devoid of any evidence that, when he refused to operate truck 244, Brown was attempting to grieve under

² The Sixth Circuit's Opinion denying enforcement on other grounds rendered unnecessary a ruling on this point, which has been preserved by Respondent.

or make reference to the collective bargaining agreement's article pertaining to vehicle safety (Petition, App. A, 4a-5a; App. C, 14a-15a).

Thus, Brown's termination by Respondent preceded, and was unrelated to, any grievance or other reference to the collective bargaining agreement, as well as any involvement of his union or other employees. He was terminated solely for refusing to do his assigned job and then going home.

REASONS FOR DENYING THE PETITION

Respondent submits that the Petition should be denied because the question properly framed by the facts in the present case is *not* the subject of conflicting opinions in the courts of appeal, and, furthermore, is *not* a significant issue in the administration of the National Labor Relations Act.

As will be shown, the question of whether an individual employee's filing or assertion of a grievance pursuant to a collective bargaining agreement — which has come to be known as the *Interboro*³ doctrine — may indeed be the subject of conflicting opinions in the courts of appeal. However, that legal question is not presented in this case because, as a factual matter, Brown plainly did not assert or even attempt to assert a grievance pursuant to the collective bargaining agreement, nor did he make any reference to the collective bargaining agreement. Simply stated, Brown individually refused to perform assigned work in a context barren of Section 7 concerted activity; his conduct was merely a personal "gripe." No conflict in the opinions of the courts of appeal exists in these factual circumstances. Board orders in such cases have universally been denied enforcement.

³ See *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295 (1966), *enfd.*, 388 F.2d 495 (2d Cir. 1967).

A review of the Second Circuit's opinion in *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (1967), and similar cases in other courts of appeal demonstrates the inapplicability of the *Interboro* doctrine to this case.

In *Interboro Contractors, Inc.*, two employees grieved and brought their union into a number of contractual pay and working conditions disputes with their employer, which resulted in the discharge of the two employees. They were manifestly involved in "concerted" activity inasmuch as both of the two employees as well as the union participated, and the Second Circuit so held. However, the court went on to state, in the dictum of an alternative holding, a principle which has become known as the *Interboro* doctrine:

[W]hile interest on the part of fellow employees would indicate a concerted purpose, activities involving attempts to enforce the provisions of a collective bargaining agreement may be deemed to be for concerted purposes even in the absence of such interest by fellow employees. 388 F.2d at 500.

Thus, the *Interboro* doctrine demands, at a minimum, that the individual employee's conduct constitute an attempt to enforce the provisions of a collective bargaining agreement between his union and his employer — which conduct is customarily known as "grieving."

The Second Circuit cited *Interboro Contractors, Inc.*, in its later decision in *NLRB v. John Lagenbacher Co.*, 398 F.2d 459, 463 (2d Cir. 1968), cert. denied, 393 U.S. 1049 (1969), which presented factual circumstances nearly identical to those in the original *Interboro* case: three employees grieved and brought

their union into a pay dispute with their employer, which resulted in the layoff of the three employees.⁴

The decisions of other courts of appeal which the Board's Petition cites as having "adopted the reasoning of the Second Circuit in *Interboro* on this issue" (Petition, 8-9) have also all involved an employee's actual filing or assertion of a *grievance* pursuant to the collective bargaining agreement. Thus, in *NLRB v. Ben Pekin Corp.*, 452 F.2d 205 (7th Cir. 1971), a janitor *grieved* a pay shortage affecting all of the employer's janitors, which led to a meeting of all the janitors and their union representatives, and ultimately caused his discharge. Citing the *Interboro* doctrine, the Seventh Circuit held that the janitor had engaged in concerted activity — which was clearly the case even apart from the *Interboro* doctrine. Likewise, in *NLRB v. Town & Country LP Gas Service Co.*, 687 F.2d 187 (7th Cir. 1982), the Seventh Circuit held that an individual employee's pursuit of a *grievance* under the collective bargaining agreement alleging disparate treatment of employees — which ultimately motivated the employer to discharge him — was concerted activity within the protection of Section 7.⁵

⁴ In its only other case dealing with the *Interboro* doctrine, *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 845 (2d Cir. 1980), the Second Circuit acknowledged that the doctrine began as dictum and refused to extend it beyond the factual circumstances presented in the *Interboro* case.

⁵ *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23, 28 n. 10 (7th Cir. 1980), cited by the Board (Petition, 9), reaffirmed the Seventh Circuit's adoption of the *Interboro* doctrine. The doctrine was inapplicable in *Pelton Casteel*, however, because there was no union and, consequently, no collective bargaining agreement. Denying enforcement of a Board order, the court ruled that an employee had merely engaged in unprotected personal "griping" by complaining about job rates and overtime.

The Eighth Circuit's decision in *NLRB v. Selwyn Shoe Manufacturing Corp.*, 428 F.2d 217, 219-221 (8th Cir. 1970), upheld the Board's finding that an employee had engaged in concerted activity by vigorously complaining of, and properly invoking the *grievance* procedure over, the employer's violation of the seniority provisions of the collective bargaining agreement. The court concluded: "The submission of a *grievance* based on the collective bargaining agreement cannot be the basis for discharge." 428 F.2d at 221 (emphasis added).⁶

Nevertheless, as the Board's Petition observes (Petition 9-10), a number of courts of appeal have expressly repudiated the *Interboro* doctrine, based upon a conclusion that it creates a legal fiction, a type of "constructive" concerted activity, beyond the scope or intent of Section 7. See *NLRB v. Northern Metal Co.*, 440 F.2d 881, 884 (3d Cir. 1971); *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 719 (5th Cir. 1973); *ARO, Inc. v. NLRB*, 596 F.2d 713, 716-717 (6th Cir. 1979). See also *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 306-307 (4th Cir. 1980); *Kohls v. NLRB*, 629 F.2d 173, 176-177 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931 (1981).

Thus, a clear conflict appears to exist among the courts of appeal as to whether the *Interboro* doctrine — which, as the above-cited cases demonstrate, would treat as "concerted" activity an individual employee's grievance filed pursuant to a collective bargaining

⁶ See also *Keokuk Gas Service Co. v. NLRB*, 580 F.2d 328, 333 (8th Cir. 1978), in which the Eighth Circuit found that an employee/union steward had engaged in concerted activity — for which he had been discharged — by threatening to file a *grievance* under the collective bargaining agreement.

agreement⁷ — is a permissible construction of Section 7. If that question were presented here, Respondent would be hard pressed to argue that it should not be resolved by this Court. However, that question is not presented and cannot be presented in the instant case because, as a factual matter, Brown never grieved, made reference to, or otherwise attempted to enforce the collective bargaining agreement's article pertaining to vehicle safety, nor did he attempt in any fashion to involve his union representatives or other employees. Brown simply refused to drive truck 244 as assigned and went home.⁸

⁷ An employee's filing of a grievance stands on a legal footing far different from his merely refusing to work and going home — which is all that Brown did in this case. First, it plainly effectuates federal labor policy favoring resolution of disputes by grievance arbitration rather than by work stoppage. See Section 203(d) of the Act, 29 U.S.C. § 173(d); *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960); *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 376-380 (1974). Second, an individual employee's filing of a grievance would appear to be intended to, and generally does, bring the employee's union representative into the dispute, whereas refusing to work and going home does not. See *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 260 (1975) ("The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7 . . ."); see also *Garment Workers v. Quality Mfg. Co.*, 420 U.S. 276, 280 n. 2 (1975).

⁸ Furthermore, Brown's refusal was not predicated upon substantial objective evidence that truck 244 was unsafe. The case accordingly fails to meet the Board's acknowledged requirement that the employee's belief must be reasonable and honestly held (Petition, 5-6; App. C, 19a) — a factual issue which Respondent has preserved. See footnote 2. This Court's decision in *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 386-387 (1974), makes clear that any belief as to unsafe working conditions must be based upon ascertainable, objective evidence rather than merely a naked assertion.

It strains the language and historical construction of Section 7 to suggest that an individual employee's flatly refusing to perform assigned work and going home, without more, constitutes concerted activity. The courts of appeal which have been confronted with such cases have, like the Sixth Circuit in the instant case, consistently refused to find concerted activity.

In *NLRB v. C & I Air Conditioning, Inc.*, 486 F.2d 977, 978-979 (9th Cir. 1973), an employee refused to work due to a condition which he perceived to be unsafe. Denying enforcement of the Board's order, the Ninth Circuit observed that the employee was merely protesting on his own behalf, that he had made no reference to the collective bargaining agreement, and that there was no evidence that he either knew of the collective bargaining agreement or was trying to enforce its terms.

Similarly, in *Kohls v. NLRB*, 629 F.2d 173, 177 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931 (1981), the District of Columbia Circuit held, in a case nearly identical to the case at bar, that a truck driver's refusal to operate a truck he believed had a brake problem did not constitute concerted activity, even though the collective bargaining agreement contained an article pertaining to vehicle safety. Denying enforcement of the Board's order, the court noted that the driver had asserted only his own interest, did not attempt to warn other employees, did not grieve prior to his discharge, and did not otherwise act in concert with his union or other employees.

In addition to the instant case, the Sixth Circuit has twice found that mere refusals by individual employees to perform assigned work did not constitute concerted activity. See *Bay-Wood Industries, Inc. v. NLRB*, 666 F.2d 1011 (6th Cir. 1981) (employee

who refused to operate an allegedly unsafe radial saw was acting solely in his own interest, filed no grievance, and was unfamiliar with the safety provisions of the collective bargaining agreement); and *United Parcel Service v. NLRB*, 654 F.2d 12 (6th Cir. 1981) (employee refused to operate an allegedly unsafe trailer door).⁹

The Board's Petition cites no court of appeals opinion, and Respondent is aware of none,¹⁰ in which concerted activity has been found in factual circumstances where, like here, an employee has simply refused to perform assigned work without grieving pursuant to the collective bargaining agreement or otherwise involving his union or other employees.

In sum, no conflict among the courts of appeal exists as to the question framed by the factual circumstances of this case. Each of the courts of appeal which has opined on the question raised here has refused to find concerted activity protected by Section 7, reasoning that the statutory language requires substantially more activity than a mere individualized refusal to perform assigned work. While it appears that a conflict among the courts of appeal exists as to

⁹ The Sixth Circuit has found the refusal by an individual employee to drive an allegedly unsafe truck to constitute concerted activity protected by Section 7 where union representatives and other employees were involved in the dispute along with the individual employee — which clearly resulted in concerted activity. See *McLean Trucking Co. v. NLRB*, 689 F.2d 605 (6th Cir. 1982).

¹⁰ In *Roadway Express, Inc. v. NLRB*, 532 F.2d 751 (4th Cir. 1976), the Fourth Circuit, without opinion, enforced a Board order on facts similar to those here. See 217 N.L.R.B. 278 (1975). However, the Fourth Circuit's subsequent opinions in *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 306-307 (4th Cir. 1980), and *Blaw-Knox Foundry & Mill Machinery, Inc. v. NLRB*, 646 F.2d 113, 116 (4th Cir. 1981), demonstrate that that court would refuse to find concerted activity on such facts.

the Board's *Interboro* doctrine — a question which may deserve resolution by this Court — that question is not properly presented by the facts in this case.

Furthermore, the question framed by this case is not a significant one in the administration of the National Labor Relations Act. An individual employee who is terminated for refusing to perform assigned work clearly has a contractual remedy if, as is contended by the Board in this and similar cases, the collective bargaining agreement justifies or excuses his non-performance. Indeed, after he was terminated Brown did pursue his contractual remedy into the initial stages of the grievance procedure, but pressed it no further (Petition, App. C, 15a). He did not pursue available remedies under Section 301(a) of the Act, 29 U.S.C. § 185(a), or assert a claim under Section 502 of the Act, 29 U.S.C. § 143. Nor did he seek a remedy under the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*; see *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980). Thus, the Court need not have an abstract concern that Brown was left without a remedy to address the basis for his "gripe" as well as his subsequent termination.

CONCLUSION

The Board's Petition for a Writ of Certiorari should be denied.

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March 3, 1983

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No. 82-960

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FILED

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ALEXANDER L. STEVENS

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CITY DISPOSAL SYSTEMS, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

**REPLY BRIEF FOR THE NATIONAL LABOR
RELATIONS BOARD**

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1. Respondent contends (Br. in Opp. 7, 9, emphasis in original) that this case does not present a conflict among the circuits because the cases in which courts of appeals have upheld the Board's *Interboro* doctrine "all involved an employee's actual filing or assertion of a *grievance* pursuant to the collective bargaining agreement," whereas here the employee did not file or assert a grievance but "simply refused to drive truck 244 as assigned and went home." The cases cannot, however, be so easily distinguished, and accordingly, the conflict among the circuits, which petitioner concedes exists (Pet. 11-12), is properly presented by the facts of this case.

In this case employee Brown refused to drive a truck which he honestly and reasonably believed was unsafe.¹ That Brown, in a heated exchange with his supervisor, did not expressly invoke the relevant section of the collective bargaining agreement, does not, as respondent suggests (Br. in Opp. 5), show that he was not asserting a contract right in refusing to drive the truck. An employee cannot be expected to assert his claim with the precision of a lawyer. Cf. *Love v. Pullman Co.*, 404 U.S. 522, 526-527 (1972). In any event, Brown filed a grievance pursuant to the contract at the first opportunity after respondent discharged him for his refusal to drive the truck (Pet. App. 3a). Since Brown's refusal was based on the unsafe condition of the truck—a matter specifically covered by the contract which the supervisors would be presumed to know—the employer was put on notice that a contractual provision was implicated by Brown's refusal, and this was confirmed when Brown subsequently filed his grievance, relying on Article XXI, Section 4 of the agreement (Pet. 4 n.2).

¹ Respondent's challenge (Br. in Opp. 4, 9 n.8) to the Board's finding that Brown had a reasonable and honest belief that truck 244's brakes were unsafe was not ruled on by the court of appeals and hence is not properly before this Court. In any event, it is clear that there is ample evidentiary support for the Board's finding. Thus, as shown in the petition (Pet. 2-4), on Saturday, May 12, 1979, Brown was aware that fellow employee Hamilton had complained about the brakes on truck 244 and had left the truck with mechanics Castelono and Ammerman, who promised to fix it over the weekend or Monday morning. Very early Monday morning, when Brown, who started to drive truck 245, reported to mechanic Ammerman that one of the wheels was defective, Ammerman told him that he would be unable to fix the truck that day because of the backlog of trucks in need of repair. In these circumstances, when Supervisor Madary then asked Brown to drive truck 244, Brown could reasonably have believed that this truck was part of the backlog and had not yet been repaired. This belief was confirmed when Madary, in responding to Brown's refusal to drive truck 244 because it had "problems," failed to indicate that the problems had been corrected, and instead remarked that "half [the trucks around here] [had]

Nor is a different conclusion warranted because Brown refused to drive the truck and filed his grievance only after he was discharged, instead of consenting to drive the truck and then filing a grievance. At the time Brown refused to drive the truck and went home, he was not told that his conduct would result in discipline. And, since the collective agreement (Pet. 4 n.2) expressly grants to employees the right to refuse to operate unsafe equipment, there was no reason why he should file a grievance in the absence of adverse action or the threat of adverse action. Indeed, where, as here, the employee is raising a safety complaint, it is hardly reasonable to expect him to operate the unsafe equipment *first* and grieve *later*. Cf. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12 (1980) ("It would seem anomalous to construe [the Occupational Safety and Health Act] * * * as prohibiting an employee, with no other reasonable alternative, the freedom to withdraw from a workplace environment that he reasonably believes is highly dangerous.").

Nor does the timing of the grievance in this case distinguish it from those cases upholding the Board's *Interboro* rule. In *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 496-497 (2d Cir. 1967), the employees, *inter alia*, refused to work separately, claiming that the collective bargaining agreement required employees to work with a partner. Similarly, in *NLRB v. John Langenbacher Co.*, 398 F.2d 459, 461 (2d Cir. 1968), cert. denied, 393 U.S. 1049 (1969), the employees refused to work a split shift without the premium pay which they contended the contract provided. Thus, in both of those cases, as here, the employees refused to perform work which they believed to be in violation of the contract.

problems' " and that if respondent tried to deal with all of them it would be unable to do business. Moreover, when Brown asked whether Madary was going to "put the garbage ahead of the safety of the men," Madary did not respond (Pet. App. 13a-14a).

In sum, there is no meaningful difference between the situation here and those in the other cases in which the courts of appeals have upheld the Board's *Interboro* doctrine. Moreover, the court of appeals in this case did not reject the *Interboro* doctrine on the basis of Brown's failure to file a grievance before he was discharged (Pet. App. 3a-4a).

2. Respondent also asserts (Br. in Opp. 12) that this case is not important because Brown had other avenues of redress against respondent that he failed to pursue. Specifically, respondent notes that Brown had a contractual remedy if the collective bargaining agreement excused his refusal to drive the truck, and that, while he pursued his grievance through the initial stages of the grievance procedure, he pressed it no further (*ibid.*). Respondent ignores the fact, however, that the third stage of the grievance procedure, taking the grievance to a Board of Arbitration, could be invoked only by the Union, which declined to do so.² In addition, absent exhaustion of the contract grievance procedure, Brown also had no right to file an action for wrongful discharge under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. 185, unless he could prove that the Union breached its duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171, 186 (1967). In any event, even if Brown had other means of recourse available to him, these could not foreclose the Board from protecting Brown's Section 7 (29 U.S.C. 157) rights after it found that respondent wrongfully discharged him. See Section 10(a) of the National Labor Relations Act, 29 U.S.C. 160(a).

²The fact that the Union may have decided not to take Brown's grievance to arbitration does not indicate that he did not have a reasonable belief that the truck was unsafe. A union may have a variety of reasons for refusing to incur the time and expense of arbitration. See *Vaca v. Sipes*, 386 U.S. 171, 191-192 (1967). In any event, an

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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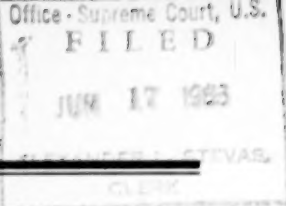
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MARCH 1983

employee's assertion of a safety complaint may not be deemed unreasonable merely because his position is not ultimately upheld in a grievance proceeding. As Judge MacKinnon stated in his concurring opinion in *Banyard v. NLRB*, 505 F.2d 342, 350 (D.C. Cir. 1974):

Even though Banyard's position * * * ultimately proved erroneous, his position was not unreasonable. * * * As long as Banyard acted with a reasonable and good faith belief that his interpretation of the contract was correct, the National Labor Relations Act protects his concerted efforts to enforce that interpretation. Otherwise, employees would be discouraged from asserting interpretations favorable to themselves except in the clearest situations involving unambiguous contract language. In other words, the employee is protected when he engages in concerted activity to enforce a reasonable and good faith interpretation of the contract, even though his interpretation ultimately does not prevail.

See also *NLRB v. John Langenbacher Co.*, *supra*, 398 F.2d at 462-463.



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QUESTION PRESENTED

Whether the Board properly concluded that an individual employee's honest and reasonable assertion of a right that is provided for in a collective bargaining agreement is concerted activity within the meaning of Section 7 of the National Labor Relations Act, 29 U.S.C. 157.

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OCTOBER TERM, 1982

No. 82-960

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CITY DISPOSAL SYSTEMS, INC.

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT*

BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 683 F.2d 1005. The decision and order of the National Labor Relations Board (Pet. App. 7a-22a) are reported at 256 N.L.R.B. 451.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6a) was entered on July 22, 1982. On October 12, 1982, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including November 19, 1982, and on November 9, 1982, she further extended the time to and including December 19, 1982. The petition for a writ of certiorari was filed on December 9, 1982, and granted on March 28, 1983 (J.A. 69). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), provides in pertinent part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] * * *.

STATEMENT

1. Respondent hauls garbage for the City of Detroit using tractor-trailers that take the garbage from respondent's Detroit facility, where the City initially dumps it, to a landfill in Belleville, Michigan, about 37 miles away (Pet. App. 10a-11a; J.A. 15, 38-39).¹ Respondent employs numerous drivers who operate the trucks. The general policy is to assign each driver to a particular truck, unless that truck is in need of repair (Pet. App. 2a, 11a; J.A. 14, 40).

Respondent is party to a collective bargaining agreement with Local Union No. 247, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the Union") covering its drivers (Pet. App. 9a; J.A. 4, 61-65). Section 1 of Article XXI of the Agreement provides (J.A. 64):

The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with the safety appliances prescribed by law. It shall not be a violation of this Agreement where

¹ References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

employees refuse to operate such equipment unless such refusal is unjustified.

In addition, Section 4 of the Agreement provides (*id.* at 65):

The Employer shall not ask or require any employee to take out equipment that has been reported by any other employee as being in an unsafe operating condition until same has been approved as being safe by the mechanical department.

James Brown, one of respondent's employees, who was subject to the collective agreement, had been employed by respondent as a truck driver since November 3, 1975 (Pet. App. 10a-11a; J.A. 4). Brown's routine assignment was to operate a tractor-trailer unit designated truck No. 245. On Saturday, May 12, 1979, as Brown was preparing to dump a load of refuse at the landfill, he noticed that Frank Hamilton, another driver for respondent, was having difficulty stopping his truck, which was designated No. 244 (Pet. App. 11a; J.A. 4, 5). After Hamilton finally stopped, Brown asked what the trouble was. Hamilton exclaimed, "Look, Brown, I almost hit you" and then explained, "I don't got a sign of brakes," especially when "pulling up" on the landfill (Pet. App. 11a-12a; J.A. 6, 25, 29).

Brown and Hamilton then returned to respondent's Detroit facility, where Hamilton spoke with mechanic Francis Castelono about truck No. 244's brake problem. Castelono and mechanic David Ammerman told Hamilton that they would fix it over the weekend or perhaps on Monday morning (Pet. App. 12a; J.A. 26).

Early in the morning on Monday, May 14, while transporting a load of refuse, Brown experienced difficulty with one of the wheels on truck No. 245 and returned it for repair. He reported the problem to mechanic Ammerman. Ammerman told Brown that he would be unable to fix the truck that day because of the backlog of trucks in need of repair and advised Brown

to go home or see his supervisor about using another truck (Pet. App. 12a; J.A. 8-9). Brown then reported to his supervisor, Otto Jasmund, who, after checking out Brown's report about truck No. 245, advised Brown that he should punch out and go home (Pet. App. 13a; J.A. 10, 19-20).

Before Brown left the premises, however, Jasmund asked him to remain and drive truck No. 244 (Pet. App. 13a; J.A. 11-20). Brown declined, explaining that "there's something wrong with that truck" (*ibid.*). Brown further explained that "something was wrong with the brakes * * * there was a grease seal or something leaking causing it to be [a]ffecting the brakes" (Pet. App. 13a; J.A. 12, 20). Jasmund angrily told Brown to go home, and this remark led to an argument between them (*ibid.*).

Supervisor Robert Madary intervened and asked Brown to drive truck No. 244. Brown again refused, explaining to Madary that the truck "has got problems and I don't want to drive it" (Pet. App. 13a; J.A. 12, 20). Madary replied that "half [the trucks around here] 'have problems'" and that if respondent tried to deal with all of them it would be unable to do business (Pet. App. 13a-14a; J.A. 12). During the conversation, Brown asked, "Bob, what you going to do, put the garbage ahead of the safety of the men?" (Pet. App. 14a; J.A. 12). Madary did not reply, nor did he or Jasmund make any attempt to show Brown that the truck was safe (Pet. App. 20a; J.A. 12, 50). Instead, they allowed Brown to go home (Pet. App. 15a; J.A. 12, 50). Later that day, Brown was discharged (Pet. App. 15a; J.A. 13).²

² John Calandra, the Union's recording secretary, received notice that same day that respondent had discharged Brown and he then notified Brown. That afternoon Calandra and Brown went to respondent's facility, where they met with supervisors

On May 15, the day after his discharge, Brown filed a written grievance, asserting that he had been improperly ordered to drive truck No. 244 (Pet. App. 15a). Citing Article XXI, Section 4 of the collective bargaining agreement, Brown stated that "Truck #244 was reported by the regular driver as being defect[ive] * * * and had not been repaired" (J.A. 65, 66). The Union declined to pursue Brown's grievance beyond the first step of the grievance procedure (Pet. App. 15a).

2. On September 7, 1979, Brown filed an unfair labor practice charge with the National Labor Relations Board (Pet. App. 15a). Upholding the decision of the administrative law judge ("ALJ"), the Board concluded that respondent violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging Brown (Pet. App. 7a).

The ALJ found that Brown had not voluntarily quit his job, as respondent had contended, but rather, that he was discharged for refusing to operate truck No. 244 (Pet. App. 17a). The judge further held that Brown's refusal was protected by Section 7 of the Act, 29 U.S.C. 157. The judge quoted from an earlier Board decision, *Roadway Express, Inc.*, 217 NLRB 278, 279 (1975), in which the Board had addressed the question whether an employee, acting alone in his assertion of a contractual right, can be said to be engaged in "concerted" activity within the meaning of Section 7:

[W]hen an employee makes complaints concerning safety matters which are embodied in a contract, he is acting not only in his own interest, but is attempting to enforce such contract provisions in the

Jasmund and Madary. The supervisors refused to reinstate Brown (Pet. App. 14a-15a; J.A. 13-14, 31-32).

Respondent's disciplinary form stated that Brown had "violated the following company rule * * *. Disobeying of orders (Refused to drive #244)," and added that Brown had "voluntarily quit" (J.A. 67).

interest of all the employees covered under that contract. Such activity we have found to be concerted and protected under the Act, and the discharge of an individual for engaging in such activity to be in violation of Section 8(a)(1).

Applying this reasoning to Brown's situation, the ALJ concluded (Pet. Ap. 17a, 18a-19a) that Brown's refusal came within Section 7 because Brown, on the basis of a reasonable and honest belief that the brakes on truck No. 244 were inadequate, had made a good faith assertion of the contractual right to refuse to drive unsafe equipment.³ Respondent's discharge of Brown for asserting that right accordingly violated Section 8(a)(1) of the Act.

In adopting the judge's decision, the Board noted that in *ARO, Inc. v. NLRB*, 596 F.2d 713 (1979), a similar case, the United States Court of Appeals for the Sixth Circuit had declined to enforce the Board's order because it did not consider the employee's protest "concerted" activity within the meaning of Section 7. The Board nonetheless adhered to its position that conduct such as Brown's, which is supported by a collective bargaining agreement, is "concerted" activity, even though the employee acts alone (Pet. App. 7a n.3). The Board ordered Brown reinstated with back pay.

3. The court of appeals denied enforcement of the Board's order (Pet. App. 1a-5a). The court did not disturb the Board's findings that respondent discharged Brown because he had declined to drive a truck he asserted was unsafe or that Brown's refusal to drive the

³ The judge found it immaterial that "another driver subsequently drove truck 244 without incident or that Respondent's record[s] show that truck 244 may have been in good repair * * *" (Pet. App. 19a). "Operation of the Board's policy as set forth in *Roadway Express* is not dependent on the merits of the asserted contract claim" but only on whether "the claimed belief [is] 'honestly held'" (Pet. App. 18a-19a).

truck constituted a reasonable, good faith assertion of a right secured for Brown and all his fellow unit employees in the collective bargaining agreement.⁴ The court rejected the Board's order solely because it concluded that Brown's refusal was not "concerted" activity within the meaning of Section 7 (Pet. App. 4a). Adhering to its previous decision in *ARO, Inc. v. NLRB, supra*, the court held:

For an individual claim or complaint to amount to concerted action under the Act it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action and have some arguable basis in the collective bargaining agreement.

(Pet. App. 4a, quoting from *ARO, Inc. v. NLRB, supra*, 596 F.2d at 718). Applying that test, the court of appeals found that Brown's action in refusing to drive truck No. 244 was not concerted because "[t]here is no evidence in the record that Brown acted or asserted an interest on behalf of anyone other than himself. Brown did not attempt to warn other employees not to drive the truck he believed to be unsafe * * *. Likewise, Brown did not go to his union representative in an effort to avoid driving the truck he considered unsafe" (Pet. App. 4a).⁵

⁴ In the court of appeals—as before the Board—respondent raised two issues: (1) whether a single employee's invocation of a collectively bargained contractual right, when he is motivated by his own personal advantage, amounts to "concerted" activity, and (2) whether Brown's refusal to drive the truck was based upon an honestly held and reasonable belief that the truck was dangerous (Respondent's Ct. App. Br. 9-20). The court of appeals based its decision entirely on its view that no "concerted activities" were involved and found it unnecessary to address "other arguments raised by the Company" (Pet. App. 5a).

⁵ The court acknowledged that Brown did make a comment to his supervisor regarding the safety of all of respondent's driv-

SUMMARY OF ARGUMENT

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, confers upon every employee the right to "engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." For more than 20 years the National Labor Relations Board has held that the right extends to each individual employee who protests against an employer's action which the employee honestly and reasonably believes is inconsistent with the terms of a collective bargaining agreement. See *Bunney Bros. Construction Co.*, 139 N.L.R.B. 1516 (1962). In adopting this interpretation, the Board has relied expressly upon two justifications: a complaint based on a collective agreement constitutes an extension of the collective action that led to the creation of the bargaining agreement; and the assertion of the contractual right is inherently of mutual interest to all employees in the unit since their rights under the contract are implicated by such claims. Compare *id.* at 1519 with *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, 1298 (1966), enforced, 388 F.2d 495 (2d Cir. 1967).

A. The courts that have rejected the Board's *Interboro* doctrine have relied on the "plain meaning" of Section 7, in holding that an individual employee is not acting in concert with his fellow employees when he engages in a personal, contract-based dispute with an employer. See, e.g., *NLRB v. Northern Metal Co.*, 440 F.2d 881 (3d Cir. 1971). But Section 7 is not limited to protecting employees acting in concert; rather, by its terms, it extends to any employee engaged in "concerted activities," a phrase that has uniformly been understood as protecting at least some conduct undertaken

ers, but held that this single, isolated statement had not been expressly relied upon by the Board, and, in any event, was not "substantial evidence" of concertedness (Pet. App. 4a).

by individual employees. See, e.g., *Aro, Inc. v. NLRB*, *supra*, 596 F.2d at 717; Note, *Individual Rights for Organized and Unorganized Employees Under the National Labor Relations Act*, 58 Tex. L. Rev. 991, 998 (1980). Accordingly, the Board's view that the nexus between an individual's contract-based complaint and the collective interests of all the employees is sufficient to convert the individual action into concerted activity is fully consistent with the language of the statute. See *Illinois Ruan Transport Corp. v. NLRB*, 404 F.2d 274, 288-289 (8th Cir. 1968) (en banc) (Lay, J., dissenting).

The *Interboro* doctrine is not inconsistent with Congress' intent in limiting Section 7 to protecting "concerted activities." The pertinent language in the 1935 National Labor Relations Act had its origin in the Norris-LaGuardia Act, ch. 90, Section 2, 47 Stat. 70 (29 U.S.C. 102); it was included there to prevent federal courts from relying on conspiracy-based criminal laws to halt organizing efforts by employees. See *Automobile Workers, Local 232 v. Wisconsin Employment Relations Board (Briggs & Stratton)*, 336 U.S. 245 (1949). The inclusion of "concerted activities" in Section 7 of the NLRA was intended by Congress affirmatively to expand the rights of every employee vis-a-vis his employer, and nothing in the history of the provision indicates that it was intended in any way to limit narrowly that protection, so long as individual conduct has a reasonable nexus to collective action. See Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. Pa. L. Rev. 286, 338 (1981).

B. The two nexuses between the individual employee's contract claim and the collective good relied upon by the Board in the *Interboro* doctrine are based on a practical understanding of how collective bargaining agreements are implemented at the workplace; this is a matter within the Board's expertise and accordingly en-

titled to judicial deference. See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978); *NLRB v. Iron Workers*, 434 U.S. 335, 350 (1978); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260-262 (1975); *NLRB v. Servette, Inc.*, 377 U.S. 46, 55-56 (1964); *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 499 (1960). The doctrine is not based upon a "legal fiction." On the contrary, real collective effort, which the Act was passed to promote, created the disputed contract right (see *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937)) and an individual's assertion of that right gives the collective rights reality, both for the individual and for the group (*Smith v. Evening News Association*, 371 U.S. 195, 200 (1962)). What is "fictional" is the notion that a single employee's assertion of a contract right—a right that was obtained by action of the group and that was intended to benefit each of its members—is not "concerted."

C. Unlike the Board's rule, which permits employees to assert vigorously their rights derived from the collective agreement, the decision below, requiring the Board to show that the individual's pursuit of his contract claim was motivated by more than self-interest, creates gaps in the coverage of Section 7 that Congress could not have intended (see *NLRB v. Servette, Inc.*, *supra*, 377 U.S. at 55-56; *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 626-628, 633 (1975)) and necessarily discourages other employees from protesting against the employer's failure to abide by his contract. Thus, if fortuitously, the employee happens to have a helper who also refuses to drive an apparently unsafe truck, both employees are protected. But if only one employee protests, then he is subject to dismissal. What is worse, even if the employee protests first but then agrees to drive the truck, he still could be discharged simply for protesting. Since the court's decision is based solely on how many em-

ployees are involved in the protest, the individual's conduct is not "concerted"; discharge is thus permissible for vocal protest, momentary hesitation in deciding whether to risk driving an unsafe truck or absolute refusal to drive.

D. By contrast, the Board's determination that conduct is "concerted activity" within the meaning of Section 7 does not end the inquiry. Even employees engaged in "concerted activity" may sometimes forfeit the protection of Section 7 because of the form their conduct takes. Thus, an employer could still discharge an employee if the protest is unduly abusive (*NLRB v. Ben Pekin*, 452 F.2d 205 (7th Cir. 1971)) or if a refusal to work clearly violates a no-strike clause in a collective bargaining agreement. Here, however, the Board found that employee Brown honestly and reasonably asserted a claim derived from the collective bargaining agreement when he refused to drive the truck; and the agreement expressly provided that justified refusals on safety grounds would not violate other provisions of the agreement. Accordingly, the Board was correct both as to the issue now presented to the Court—whether Brown's conduct was "concerted activity"—and in its ultimate finding that respondent violated Section 8(a)(1) of the Act by interfering with Brown's rights under Section 7 when it discharged him.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT AN INDIVIDUAL EMPLOYEE'S HONEST AND REASONABLE ASSERTION OF A RIGHT THAT IS PROVIDED FOR IN A COLLECTIVE BARGAINING AGREEMENT IS CONCERTED ACTIVITY WITHIN THE MEANING OF SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT

The basic rights guaranteed to each employee by the National Labor Relations Act are set out in Section 7 of the Act, 29 U.S.C. 157, which provides in pertinent part (emphasis added):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other *concerted activities for the purpose of collective bargaining or other mutual aid or protection*
 * * *

Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]."

The pivotal language of Section 7 at issue in this case is the phrase "concerted activities"; specifically, the question is to what extent and in what circumstances an employee acting alone has engaged in concerted action. The Board has held since at least 1962 that an employee who asserts claims based on a collective bargaining agreement is engaged in concerted activity because "in asserting such a claim, [the employee] sought to implement the collective bargaining agreement" and "the implementation of such an agreement by an employee is but an extension of the concerted activity giving rise to that agreement." *Bunney Bros. Construction Co.*, 139 N.L.R.B. 1516, 1519 (1962). In *Bunney Bros.*, the employee submitted a claim for a half day's pay when rain forced the employer to shut down after only two hours of work, that was the pay arrangement expressly provided for in the collective bargaining agreement. Nevertheless, the employer discharged the employee. The Board held that this was a violation of Section 8(a)(1) of the Act.

The case from which the general doctrine linking the individual assertion of collective bargaining rights with Section 7 protection derives its name, *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, 1298 (1966), enforced, 388 F.2d 495 (2d Cir. 1967), was, in part, an application of the rule already adopted in *Bunney Bros.* The Board did, however, supply an additional, albeit

related, justification for the rule that a contractually-based protest is covered under Section 7. *Interboro* concerned the discharge of John and William Landers, two brothers who had complained to their employer about working conditions and terms of payment that did not meet requirements set by the collective bargaining agreement. The Trial Examiner dismissed the unfair labor practice complaint because he concluded that the protests were effectively made by John alone and that he complained not for "legitimate union or concerted objectives" but rather "for his own personal selfish benefit and aggrandizement" (157 N.L.R.B. at 1311). The Board did not agree that John was alone in speaking out to the employer, finding, instead, that John's brother and another man, Collins, had also been "involved in the complaints" (*id.* at 1298). The Board, however, explained further (*ibid.*; footnote omitted, emphasis added):

[E]ven if the complaints were made by John alone, they still constituted protected activity since they were made in the attempt to enforce the provisions of the existing collective bargaining agreement. [We have] held that complaints made for such purposes are *grievances within the framework of the contract that affect the rights of all the employees in the unit*, and thus constitute concerted activity which is protected by Section 7 of the Act.

Accord: *T & T Industries, Inc.*, 235 N.L.R.B. 517, 520 (1978); *Roadway Express, Inc.*, 217 N.L.R.B. 278 (1975), enforced, 532 F.2d 751 (4th Cir. 1976); *John Sexton & Co.*, 217 N.L.R.B. 80 (1975); *Chas. Ind. Co.*, 203 N.L.R.B. 476 (1973); *H.C. Smith Construction Co.*, 174 N.L.R.B. 1173, 1174 (1969). Thus, the Board's *Interboro* doctrine is predicated on these two theories: the assertion of a right in a collective bargaining agreement is an extension of the concerted activity that gave rise to the agreement in the first place and the claim based on the contract necessarily affects the rights and

interests of all the other employees in the bargaining unit.

A number of courts of appeals have upheld applications of the *Interboro* doctrine.⁶ Indeed, the Eighth Circuit regarded it as "obvious that rights secured by [a collective bargaining] agreement, though personal to each employee, are protected rights under Section 7 of the Act because the collective bargaining agreement is the result of concerted activities by the employees for their mutual aid and protection." *NLRB v. Selwyn Shoe Manufacturing Corp.*, 428 F.2d 217, 221 (1970). See also *Illinois Ruan Transport Corp. v. NLRB*, 404 F.2d 274, 289-289 (8th Cir. 1968) (Lay, J., dissenting). On the other hand, several courts of appeals have rejected the Board's interpretation of Section 7.⁷ Those

⁶ *NLRB v. Ben Pekin Corp.*, 452 F.2d 205, 206 (7th Cir. 1971); *NLRB v. Selwyn Shoe Manufacturing Corp.*, 428 F.2d 217, 221 (8th Cir. 1970); *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 500 (2d Cir. 1967). See also *NLRB v. Town & Country LP Gas Service Co.*, 687 F.2d 187, 191-192 (7th Cir. 1982); *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 845 (2d Cir. 1980) (dictum); *NLRB v. John Langenbacher Co.*, 398 F.2d 459, 463 (2d Cir. 1968), cert. denied, 393 U.S. 1049 (1969).

⁷ The court below relied on its own prior decision in *Aro, Inc. v. NLRB*, 596 F.2d 713, 718 (6th Cir. 1979), in which it held (emphasis added):

For an individual claim or complaint to amount to concerted action under the Act it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action and have some arguable basis in the collective bargaining agreement.

Several other circuits have expressed a similar view. See, e.g., *Royal Development Co. v. NLRB*, 703 F.2d 363 (9th Cir. 1983); *NLRB v. Northern Metal Co.*, 440 F.2d 881, 884 (3d Cir. 1971); *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 719 (5th Cir. 1973) (dictum). But see *Anchortank, Inc. v. NLRB*, 618 F.2d 1153, 1161 n.10 (5th Cir. 1980), in which the Fifth Circuit suggested that the Board's theory was supported by this

courts require not only that the claim be based on the collective bargaining agreement but also that it be asserted with some indication that the employee contemplates group action.

What distinguishes the courts of appeals that have rejected the construction of "concerted activities" embodied in the *Interboro* doctrine from those that have accepted it is both a failure to accord adequate deference to the views of the Board, the agency charged with administering the Act, and a failure to appreciate either the importance of a collective bargaining agreement for individual employees or the ways in which a collective bargaining agreement is translated from mere paper promises into a reality in the workplace.

- A. The Board's *Interboro* doctrine is fully consistent with the language of Section 7 of the National Labor Relations Act and is not inconsistent with the intention of Congress in limiting the scope of the statute to "concerted activities"

1. This Court has clearly held that the task of defining the scope of Section 7 "is for the Board to perform in the first instance as it considers the wide variety of cases before it" (*Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978)), and in general that any "defensible construction" the Board adopts is entitled to "considerable deference" (*NLRB v. Iron Workers*, 434 U.S. 335, 350 (1978)). Courts that have rejected the Board's *Interboro* doctrine have done so, at least in part, because they have concluded that the language of Section 7 does not permit the Board's interpretation.*

Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

* The Third Circuit in *NLRB v. Northern Metal Co.*, *supra*, 440 F.2d at 884, cited a dictionary definition describing "concerted" in terms of mutual planning or agreement and asserted that that circuit's own gloss on the term, reading it as including

It is clear, however, that the Board's *Interboro* doctrine does not fly in the face of language that compels a contrary conclusion. Section 7, after all, speaks of "concerted activities"—not "employees acting in concert"—so the provision cannot be said to be plainly limited to actions taken by two or more employees acting in tandem. Indeed, no court of appeals has held that Section 7 excludes conduct solely because it was engaged in by a single employee. See *Aro, Inc. v. NLRB*, 596 F.2d 713, 717 (6th Cir. 1979). As one commentator has pointed out, "[The circuit courts] are uniform * * * in extending the 'concerted activities' clause to include activity by an individual who is in fact acting on behalf, or as representative, of other employees." Note, *Individual Rights for Organized and Unorganized Employees Under the National Labor Relations Act*, 58 Tex. L. Rev. 991, 998 (1980). Moreover, the Board's interpretation comports with the express limitation in the statute to "concerted activities"; the Board has acknowledged that not all individual employee protests come within the ambit of Section 7.⁹ Nevertheless, it

not only group action, but also "talk looking toward group action" (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)) "stretched" its meaning. Nevertheless, it concluded (440 F.2d at 884) that the *Mushroom Transportation* gloss was reasonable, while the *Interboro* doctrine represented an unacceptable expansion of the plain meaning of the statute.

⁹ The Board thus does not regard instances of mere "personal griping," when there is no collective agreement or other basis for mutual concern (see note 13, *infra*), as "concerted activities" within the meaning of Section 7. See, e.g., *Capitol Ornamental Concrete Specialties, Inc.*, 248 N.L.R.B. 851 (1980); *Tabernacle Community Hospital & Health Center*, 233 N.L.R.B. 1425, 1428-1429 (1977); *Snap-On Tools Corp.*, 207 N.L.R.B. 238, 239 (1973); *Northeastern Dye Works, Inc.*, 203 N.L.R.B. 1222, 1223 (1973); *Continental Manufacturing Corp.*, 155 N.L.R.B. 255, 257-258 (1965); *Ryder Tank Lines, Inc.*, 135 N.L.R.B. 936, 938 (1962).

properly recognizes that a single employee's reasonable, good faith assertion of a right secured in a collective bargaining agreement necessarily involves or affects collective interests, which are the interests Section 7 on its face is designed to protect.

2. There is thus no proper basis for rejecting the Board's *Interboro* doctrine on any plain meaning theory. Of course, the phrase "concerted activities" is susceptible to either a broad or narrow reading, and if the legislative history indicated that Congress intended to limit the coverage of Section 7 to activities engaged in by—or expressly on behalf of—two or more employees, then naturally that intention should be honored. In fact, however, the legislative history reveals no such intent, and, if anything, suggests the contrary.

As this court and a number of commentators have observed, the significance of the phrase "concerted activities" is to be found in the history of the labor movement prior to the enactment in 1935 of the National Labor Relations Act. *Automobile Workers, Local 232 v. Wisconsin Employment Relations Board (Briggs & Stratton)*, 336 U.S. 245, 257-258 (1949); Gorman & Finkin, *supra*, 130 U. Pa. L. Rev. at 331-338; Note, *supra*, 58 Tex.L. Rev. at 1006-1008; Note, *The Requirement of "Concerted" Action Under the NLRA*, 53 Colum. L. Rev. 514, 515-516 (1953). "The most effective legal weapon against the struggling labor union was the doctrine that concerted activities were conspiracies, and for that reason illegal." *Automobile Workers, Local 232 v. Wisconsin Employment Relations Board*, *supra*, 336 U.S. at 257. In response to the frequent use of this weapon by federal courts hostile to the labor movement, Congress first enacted an exemption for certain types of peaceful labor union activities—"whether singly or in concert"—from the sanctions of the antitrust laws (Sections 6 and 20 of the Clayton Act, 15 U.S.C. 17, 29 U.S.C. 52). In 1932, af-

ter the Clayton Act exemption had proved inadequate, Congress enacted the Norris-LaGuardia Act restricting federal court jurisdiction with respect to labor injunctions and declaring in Section 2 of that Act (47 Stat. 70), 29 U.S.C. 102, the statement of national policy, that "the individual * * * worker" should be free from, among other things, "the interference, restraint, or coercion of employers of labor, or their agents, in the designation of [bargaining] representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Substantially that same language was then included in Section 7(a) of the National Industrial Recovery Act, ch. 90, 48 Stat. 198, and in its successor, Section 7 of the National Labor Relations Act. See *Eastex, Inc. v. NLRB*, *supra*, 437 U.S. at 565 n.14. As Professors Gorman and Finkin have explained (130 U. Pa. L. Rev. at 338; emphasis in original):

[O]ne of the objectives of the NLRA was to take the same forms of conduct which the Clayton and Norris-LaGuardia Acts had declared protected against government sanction and declare them as well to be protected against private sanction through employer coercion and discipline. All of this legislation, to be sure, was focused principally upon the protection of group action for the purpose of improving wages and working conditions. But there is not the slightest hint in the history of the NLRA that in attempting to *expand* the protection that the law would give to *group* activity to secure benefits or improvements, Congress contemplated a *less* favored status for *individual* activity having the same objective.

In sum, protection of "concerted activities" in Section 7 of the NLRA was intended by Congress affirmatively to expand the rights of every employee vis-a-vis his employer, and nothing in the history of the provision indi-

cates that it was intended in any way to limit that protection so long as the employee's conduct has a reasonable nexus to collective action. There is, then, no basis in either the language or the legislative history of Section 7 for rejecting the Board's *Interboro* doctrine.

- B. The Board's *Interboro* doctrine is reasonable because it is based on a practical understanding of both the relationship between the collective bargaining agreement and the individual employee and the effect that a single employee's contract claim necessarily has on the interests of all other employees in the bargaining unit

1. In the absence of controlling statutory language or legislative intent, the touchstone for deciding whether the Board's interpretation of Section 7 should be upheld is whether it reasonably serves the basic purposes of the Act in general and Section 7 specifically. See *NLRB v. Servette, Inc.*, 377 U.S. 46, 55-56 (1964). In this regard, the *Interboro* doctrine accurately embodies the view, on which the Act is premised, that individual employees should have available to them the rights obtained in a collective bargaining agreement. In the National Labor Relations Act, Congress undertook to respond to the plight of the employee forced to rely solely on his own strength in dealing with his employer concerning the terms of his employment. As this Court explained in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937), citing *American Steel Foundaries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921):

[A] single employee was helpless in dealing with an employer; * * * he was dependent ordinarily on his daily wage for the maintenance of himself and family; * * * if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; * * * union was essential to

give laborers opportunity to deal on an equality with their employer.

In Section 7 of the Act, Congress extended protection to employees' efforts to join together and, through their selected representative, negotiate collective bargaining agreements with their employers.

No one questions that an individual employee is engaged in concerted activity when he files an individual grievance pursuant to the contract mechanism that collective bargaining has achieved, see, *e.g.*, *NLRB v. Ford Motor Co.*, 683 F.2d 156 (6th Cir. 1982); *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 729 (5th Cir. 1970), and there is no reason why the employee's action should not similarly be regarded as concerted when he directly makes a claim that derives its force from that same collective process.

Collective agreements make it unnecessary for employees to stand alone before their employers; employees are no longer forced to assert only their own view that they are entitled to some particular right or benefit. Even an employee who is hired after such an agreement is executed is "entitled by virtue of the National Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms." *J.I. Case Co. v. NLRB*, 321 U.S. 332, 336 (1944). Indeed, even if an employee, on his own, negotiates an individual contract with the employer, it is not "effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement [; for t]he very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect their strength and bargaining power and serve the welfare of the group." *Id.* at 338.

The *Interboro* doctrine, by protecting those employees who attempt individually to assert their bargained

for rights, helps give those rights meaning. Thus, contrary to the suggestion of some courts that the Board's *Interboro* doctrine is based upon a mere "legal fiction" involving "constructive concerted activity" (*NLRB v. Northern Metal Co.*, 440 F.2d 881, 884 (3d Cir. 1971)), real collective effort was required to obtain collective contract rights, and the individual assertion of collective rights gives those rights reality. Indeed, if there is anything artificial or fictional, it is the theory that a single employee's assertion of a collective right—a right that was obtained by action of the group—is not "concerted" unless there is either further group action or a clear design to precipitate further group action.

2. The related rationale for the *Interboro* doctrine, also derived from the Act, is the notion that an employee who speaks up concerning an employer's action that may violate the collective agreement is acting in the interest of all, whether he is acting out of conscious altruism or merely out of a desire to preserve his own immediate stake in the controversy. Ultimately, of course, most of the employees' interests in the agreement are "selfish" in the sense that each employee is concerned primarily, although perhaps not always exclusively, with the effect of the agreement on his own employment situation. But as this Court has noted in another context (*Smith v. Evening News Association*, 371 U.S. 195, 200 (1962)):

The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based.

See also *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975, quoting *Mobil Oil Corp. v. NLRB*, 482 F.2d 842 (7th Cir. 1973)) (action of an employee seeking assistance of a union representative "at a confrontation with his employer" comes within the Section 7 protection for "'concerted activities for the purpose of * * * mutual aid and protection' * * * even though the employee alone may have an immediate stake in the outcome * * *").

It makes no difference how "selfish" the employee's subjective intent may be; the fact remains that his vigilance in attempting to see that the employer respects rights that the employee reasonably assumes he enjoys under the collective agreement is likely to work to the benefit of all. That "concerted effect" should be sufficient to bring the employee's action within the ambit of Section 7. *Anchortank, Inc. v. NLRB*, 618 F.2d 1153, 1160-1161 (5th Cir. 1980) (dictum). But see *Roadway Express, Inc. v. NLRB*, 700 F.2d 687, 693-694 (11th Cir. 1983) (suggesting that the Fifth Circuit had rejected the *Interboro* doctrine in *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714 (5th Cir. 1973)).¹⁰

¹⁰ The result need not be any different simply because union stewards or other officers may be specifically assigned the task of monitoring an agreement. Similar efforts by rank-and-file employees are obviously important since they frequently may be the only ones on the spot to protest apparent contractual violations.

Nor does the *Interboro* doctrine interfere with a union's status as the employees' exclusive representative for collective bargaining under Section 9(a) of the Act, 29 U.S.C. 159(a). See *NLRB v. R.C. Can Co.*, 328 F.2d 974, 978-979 (5th Cir. 1964). The doctrine does not require an employer to entertain grievances inconsistent with the collective bargaining agreement, but simply recognizes individual employees' rights to present grievances based on the agreement. See *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 61 n.12 (1975).

3. The Board's *Interboro* doctrine thus involves a practical recognition that, regardless of what the individual employee says or thinks about his fellow workers in making a contract-based protest, his fate will necessarily affect his co-workers. Indeed, if the employee loses his job or is otherwise penalized for protesting an employer's apparent failure to abide by his contract, the very reason for having a collective bargaining agreement is directly undermined and the willingness of other employees to assert good faith protests based on the contract will be severely lessened. The Act is designed to preclude an employer from being able to deter these forms of collective action, and the Board's interpretation of Section 7 to protect the individual protestant directly furthers those goals.

Moreover, the Board's application of *Interboro* has been tailored carefully to further the express policies that support it. Thus, under *Interboro*, Section 7 applies only when the employee's actions are based on an honest and reasonable belief that the claim is supported by a provision in the collective bargaining agreement. Although the Board does not demand that the claim ultimately prove to be meritorious or that the employee refer expressly to the bargaining agreement in

Judge Lay, in dissent in *Illinois Ruan Transport Corp. v. NLRB*, 404 F.2d 274, 281-288 & n.3 (8th Cir. 1968), suggested that Section 9(a)'s proviso, which guarantees employees "the right at any time to present grievances to their employer," is, an independent source of the rights recognized in the *Interboro* doctrine. See generally Dolin, *The Interboro Doctrine and the Courts: A History of Judicial Pronouncements on the Protected Status of Individual Assertions of Collective Rights*, 31 Am. U.L. Rev. 551, 562-564 (1982); Note, *Individual Rights for Organized and Unorganized Employees Under the National Labor Relations Act*, 58 Tex. L. Rev. 991, 1003-1005 (1980). The Board, however, has made clear that the rights in *Interboro* cases are rooted solely in Section 7 of the Act. See *Colonial Stores, Inc.*, 248 N.L.R.B. 1187, 1188 n.7 (1980).

asserting his claim,¹¹ the Board does require that the claim be made in good faith and come within the scope of the agreement.¹² Obviously, other employees will not likely benefit if an individual's claim is frivolous or has no apparent connection with the collective bargaining agreement;¹³ but pursuit of a substantial claim does benefit other employees and certainly derives its justification from the collective agreement.

¹¹ See, e.g., *Michigan Screw Products*, 242 N.L.R.B. 811, 814 (1979); *Youngstown Sheet & Tube Co.*, 235 N.L.R.B. 572, 576 (1978); *John Sexton & Co.*, 217 N.L.R.B. 80 (1975).

¹² See, e.g., *National Wax Co.*, 251 N.L.R.B. 1064-1065 (1980) (employee's wage claim based on promise allegedly made to him personally, not based on collective bargaining agreement); *Snap-On Tools, Corp.*, 207 N.L.R.B. 238-239 (1973) (probationary employee's seniority claim had no basis in the contract).

While the good faith requirement is sometimes expressed in terms suggesting a subjective standard (see, e.g., *United Parcel Service*, 241 N.L.R.B. 1074, 1077 (1979), enforcement denied, 629 F.2d 173 (D.C. Cir. 1980), cert. denied, 450 U.S. 931 (1981); *Roadway Express, Inc.*, 257 N.L.R.B. 1197, 1203 (1981), enforcement denied, 700 F.2d 687 (11th Cir. 1983), petition for cert. pending, No. 82-2061), the standard as applied in most Board cases is essentially an objective one. As the Administrative Law Judge in *Youngstown Sheet & Tube Co.*, 235 N.L.R.B. 572 (1978), observed (*id.* at 576), the assertion of a frivolous claim would call into question an employee's good faith; but an arguably reasonable claim—even if not ultimately meritorious—would meet the standard.

¹³ In some instances when an individual complains to a government agency concerning statutory violations or protests to the employer regarding other matters of common concern, employees as a whole may receive some benefit, even in the absence of a collective bargaining agreement. In such cases the Board has found the complaint to be "concerted." *Diagnostic Center Hospital Corp.*, 228 N.L.R.B. 1215, 1217 (1977); *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975). The validity of this broader doctrine is not, however, at issue in this case.

This case plainly illustrates how the policies the Board seeks to further are properly applied. Under the facts found by the Board, Brown asserted a right not to drive truck No. 244 because he had reason to believe that there were problems with its brakes; and this claim is unequivocally supported by an express provision in the contract. The fact that Brown did not advert specifically to Section 1 of Article XXI of the agreement (J.A. 64) does not deprive him of this basis for his claim. An employee cannot be expected to assert his claim with the precision of a lawyer. Cf. *Love v. Pullman Co.*, 404 U.S. 522, 526-527 (1972).

In addition, Brown's refusal to drive the vehicle he believed was not in safe operating condition benefitted all of the employees by serving notice that the employer's apparent indifference to the relevant provision in the contract will not go unchallenged, thereby encouraged future compliance.¹⁴ If not punished, Brown's ac-

¹⁴ The fact that the Union did not take to arbitration Brown's challenge to his discharge does not show his claim to have been an unreasonable one. Indeed, an employee's assertion of a complaint may not necessarily be deemed unreasonable even if it is taken to arbitration and ultimately rejected. As Judge MacKinnon stated in his concurring opinion in *Banyard v. NLRB*, 505 F.2d 342, 350 (D.C. Cir. 1974):

Even though Banyard's position * * * ultimately proved erroneous, his position was not unreasonable. * * * As long as Banyard acted with a reasonable and good faith belief that his interpretation of the contract was correct, the National Labor Relations Act protects his concerted efforts to enforce that interpretation. Otherwise, employees would be discouraged from asserting interpretations favorable to themselves except in the clearest situations involving unambiguous contract language. In other words, the employee is protected when he engages in concerted activity to enforce a reasonable and good faith interpretation of the contract, even though his interpretation ultimately does not prevail.

See also *NLRB v. John Langenbacher Co.*, 398 F.2d 459, 462-463 (2d Cir. 1968), cert. denied, 393 U.S. 1049 (1969). The

tion will serve as an example for other employees who reasonably believe that the employer has disregarded the collective bargaining agreement. This potential benefit to all employees covered by the agreement warranted the Board's finding that Brown's assertion of his claim was "concerted" activity within the meaning of Section 7 of the Act.

C. The interpretation of Section 7 adopted by the court below unreasonably limits the employee's statutory protection in ways that Congress could not have intended

Notwithstanding the clear policy basis for the Board's *Interboro* doctrine, the court below required that in addition to the nexus between Brown's claim and the collective bargaining agreement, the Board show some independent relationship between Brown's refusal to drive truck No. 244 and potential group action. The proof required by the decision below creates anomalies that Congress could not reasonably have intended. For instance, there would be no issue concerning "concerted activities" in this case if Brown, in protesting that he should not be required to drive truck No. 244, had had a helper who also objected to taking the truck out, or if Brown had previously discussed unsafe trucks with another employee and spoken also on behalf of that individual, or if Brown's complaint had been phrased as a prelude to group action of some kind.¹⁵ The court's decision, making Section 7 rights turn upon such fortuities as the presence of a helper or

contract gave Brown a right to refuse to drive a truck that he was "justified" in believing was unsafe. As shown, Brown's belief that truck 244 was unsafe was both sincere and reasonable.

¹⁵ *Aro, Inc. v. NLRB*, 596 F.2d 713, 716 (6th Cir. 1979), quoted in *Kohls v. NLRB*, 629 F.2d 173, 177 (D.C. Cir. 1980); *NLRB v. Northern Metal Co.*, 440 F.2d 881, 884-885 (3d Cir. 1971); *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

the occurrence of prior discussions, serves no rational purpose, at least where it is collectively-secured rights that are being invoked. This Court has previously rejected such excessively literal readings of the National Labor Relation's Act's provisions, particularly where, as here, the basic purpose of the particular provision or the Act in general would thereby be disserved (*NLRB v. Servette, Inc.*, 377 U.S. 46, 55-56 (1964)) or unwarranted "loopholes" would be created in basic protections or prohibitions of the Act (*Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 626-628, 633 (1975)).

Under the court of appeals' reasoning, the Act provides absolutely no protection to an employee who claims a right reasonably within the scope of the collective bargaining agreement if he does not appear to be speaking for other employees as well as himself or preparing for group action. This is so regardless of how the employee presents his claim. Under the court's theory, the Act in no way precludes an employer from discharging an employee for making a claim, whether the employee refuses to do certain disputed work or simply politely requests that the employer consider granting some right under the collective agreement. Thus, the Sixth Circuit, in *Aro, Inc v. NLRB*, *supra*, 596 F.2d at 716-717, declined to enforce the Board's order with respect to an employee who had been fired merely for making complaints based on his reasonable understanding of the contract. In *Bunney Bros. Construction Co.*, *supra*, 139 N.L.R.B. at 1519, the employer discharged an employee merely for presenting a claim for compensation expressly provided for in the contract.

The court of appeals' decision thus would have allowed respondent to discharge Brown even if he had agreed to drive truck No. 244 to the dumpsite as ordered. He could have been discharged merely for stat-

ing that he thought he had the right to refuse to drive a truck with brakes that he reasonably feared were unsafe. Under the logic of the decision below, the court would find that the conduct was not "concerted" because the protest does not anticipate group action, and that would end any inquiry into the lawfulness of discharging the employee for daring to assert his rights.

D. The *Interboro* doctrine is consistent with other legal doctrines bearing on the protection afforded concerted activity

Contrary to the court of appeals' approach, under *Interboro* the Board would consider an individual employee's reasonable, contract-based claims to be "concerted," and therefore within the scope of Section 7, but a finding of "concerted" activities would not necessarily end the matter. Not all concerted activities are protected. Gorman & Finkin, 130 U. Pa. L. Rev. 286, 355-356 (1981); Note, *National Labor Relations Act Section 7: Protecting Employee Activity Through Implied Concert of Action*, 76 Nw. U.L. Rev. 813, 814-815 (1981).

Concerted activity may, for example, be carried out in so abusive a manner that the impropriety of the means outweighs the Section 7 rights of the employee. Thus, in *NLRB v. Ben Pekin Corp.*, 452 F.2d 205 (7th Cir. 1971), the court first noted its agreement with the Board that the employee involved was engaged in concerted activity when—concerned that he was not being paid the wages due under the collective bargaining agreement—he asked "Is there a payoff here?" (*id.* at 206); and it then concluded, under the test of *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), that the employee's remark "was not so defamatory or opprobrious as to isolate the allegation from the related protected activity" (452 F.2d at 207). See also *Colonial Stores, Inc.*, 248 N.L.R.B. 1187, 1189 (1980) (minimal

disruption resulting from display of an informational sign in the employer's parking lot did not cause employee to forfeit Section 7 protection of her protest of employer's failure to comply with settlement of contract grievance); *Johnson Motor Lines*, 228 N.L.R.B. 393, 395-396 (1977) (rejecting, on factual grounds, claim that steward had forfeited Section 7 rights by using grievance activity as cover for work slowdown and deliberate harassment of employer).

In addition, concerted activity may be unprotected because it is in clear violation of a no-strike clause. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 246 (1962), overruled on other grounds, 398 U.S. 235 (1970).¹⁶ While it is not always an easy question whether particular conduct constitutes a strike within the meaning of a no-strike clause, the Board will not deem an individual's contract-based protest protected under Section 7 if it finds that the conduct violates such a clause. Compare *Sunbeam Corp.*, 184 N.L.R.B. 950, 951-952 (1970), enforced, 459 F.2d 811, 816-818 (7th Cir. 1972) (Stevens, J.) (employee engaged in conduct that was concerted, but unprotected, when he protested grievance dismissal by inviting others to strike in violation of no-strike clause) with *Colonial Stores, Inc.*, *supra*, 248 N.L.R.B. at 1189 (employee's grievance protest did not lose Section 7 protection where employee protest was on nonwork time, sign displayed

¹⁶ Neither of the respondent's two exceptions filed with the Board (see note 4, *supra*) included a contention that an employee's refusal to drive a truck, if based upon a reasonable, good faith assertion of the contractual right to refuse to drive unsafe equipment, would nonetheless violate the no-strike clause of the collective bargaining agreement. Respondent was therefore barred by Section 10(e) of the Act, 29 U.S.C. 160(e), from making such an argument in the court of appeals. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-666 (1982). In any event, as we show hereafter, such a contention in this case would be without merit.

in employer's parking lot was solely informational, and no employees were induced to leave work).¹⁷

Instances of a single employee's refusal, on safety grounds, to do particular work are, however, often a special case. See Gorman & Finkin, *supra*, 130 U. Pa. L. Rev. at 354-355. In view of the fact that contractual rights respecting safety are, in many instances, of little value if the employee must perform the dangerous work first and file his grievance afterwards, unions often negotiate terms providing, in essence, that an employee's reasonable refusal to operate dangerous equipment will not constitute a violation of the contract. This was the case here (Pet. App. 11a; J.A. 64), and it is true also of many collective bargaining agreements in the transportation industry. See, e.g., *McLean Trucking Co.*, 252 N.L.R.B. 728, 730 n.8 (1980), enforced, 689 F.2d 605 (6th Cir. 1982); *Roadway Express, Inc.*, 217 N.L.R.B. 278, 279 (1975), enforced, 532 F.2d 751 (4th Cir. 1976). See also *Wheeling-Pittsburgh Steel Corp.*, 241 N.L.R.B. 1214, 1221-1222 (1979), enforced, 618 F.2d 1009 (3d Cir. 1980). In such circumstances the Board is particularly warranted in holding that Section 7 protects an employee from being discharged for exercising what he reasonably believes to be his contractual right to refuse to operate the vehicle in question. Compare *Michigan Screw Products*, 242 N.L.R.B. 811, 813-814 & n.8 (1979) (finding violation for discharge of employee who declined overtime on three occasions in reasonable belief that it was voluntary under contract, but noting that, had employer explained to employee that situation was urgent and that therefore under another contractual provision, over-

¹⁷ But see *Anco Insulations, Inc.*, 247 N.L.R.B. 612, 613 (1980) (noting single employee's picketing "without regard to the no-strike provision of the bargaining agreement" as a factor bearing on question whether conduct was concerted activity).

time could be required, case might have been in an "obey-and-grieve posture").¹⁸

¹⁸ Even in the absence of a contractual exception to a no-strike clause, a refusal to operate dangerous equipment may sometimes escape the proscription of the clause even if the conduct would otherwise be found to constitute a strike. Under 29 U.S.C. 143, which provides that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees shall not be deemed a strike under this chapter," a refusal to work—even on the part of a number of employees—will not constitute a violation of a no-strike clause where there is "ascertainable, objective evidence supporting [the employees'] conclusion that an abnormally dangerous condition for work exists." *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 387 (1974). See also *Whirlpool Corp v. Marshall*, 445 U.S. 1, 10-11 (1980).

Congress has also recently enacted legislation prohibiting the discharge or discipline of certain categories of employees employed by commercial motor carriers for refusals to operate commercial motor vehicles under specified circumstances. Section 405(b) of the Surface Transportation Assistance Act of 1982, Pub.L. No. 97-424, 96 Stat. 2157. That Section provides in pertinent part:

No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer and have been unable to obtain, correction of the unsafe condition.

The present case is consistent with these principles. The Board found that respondent discharged Brown when he claimed a right to refuse to operate truck No. 244 (Pet. App. 14a-15a, 18a). As soon as Brown was thus put on notice that his claim respecting his right not to operate truck No. 244 had been finally refused by the immediate supervisors with whom he had discussed it, he went to the Detroit facility with the business agent to attempt to reach an adjustment, and, when that was unsuccessful, he filed a written grievance on a form supplied by the Union, as provided for in the collective bargaining agreement (J.A. 62). Compare *United Parcel Service, Inc.*, 232 N.L.R.B. 1114, 1115 (1977), enforced, 603 F.2d 1015 (D.C. Cir. 1979) (Member Jenkins dissenting, agreeing that unfair labor practice complaint should be dismissed, but resting conclusion on fact that employee's conduct in pursuing grievance constituted "express repudiation of specific contract terms"); *United Parcel Service, Inc.*, 205 N.L.R.B. 991 n.2 (1973), enforced, 511 F.2d 447 (D.C. Cir. 1975) (*picketing* by employees unprotected where it contravened contractual grievance procedure). Accordingly, Brown's response was completely reasonable and fully in accord with the requirements of the collective bargaining agreement. In these circumstances, protecting Brown's right to protest does not impair any substantial interest of respondent.

In sum, the court of appeals erred in declining to uphold the Board's finding that the conduct for which Brown was discharged was protected by Section 7 of the Act; and, more specifically, with respect to the precise issue presented in this case, the court erred in holding that Brown's conduct did not constitute "con-

This special protection for employees in the commercial motor carrier industry applies regardless of whether employees enjoy any safety rights under a collective bargaining agreement.

certed" activity within the meaning of Section 7 of the Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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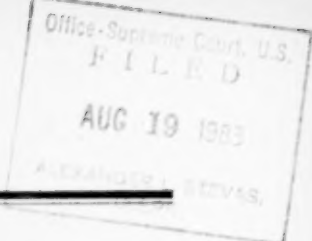
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JUNE 1983

No. 82-960



IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,
Petitioner
v.
CITY DISPOSAL SYSTEMS, INC.,
Respondent

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT
CITY DISPOSAL SYSTEMS, INC.

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QUESTION PRESENTED

Whether an employee's individual refusal to perform assigned work which he merely claims (without substantial objective evidence) to be unsafe for him personally, in the absence of any grievance under or reference to a collective bargaining agreement, and without any involvement of his union or of other employees, constitutes "concerted activities" protected by Section 7 of the National Labor Relations Act, 29 U.S.C. § 157.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-960

NATIONAL LABOR RELATIONS BOARD,
v. *Petitioner*

CITY DISPOSAL SYSTEMS, INC.,
Respondent

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

**BRIEF FOR RESPONDENT
CITY DISPOSAL SYSTEMS, INC.**

Respondent City Disposal Systems, Inc.¹ respectfully requests, for the reasons discussed herein, that this Court affirm the Judgment of the United States Court of Appeals for the Sixth Circuit entered in this matter on July 22, 1982 (688 F.2d 1005 (6th Cir. 1982)), denying enforcement of the Decision and Order of the National Labor Relations Board (256 N.L.R.B. 451 (1981)).

COUNTERSTATEMENT OF THE CASE

To avoid any misunderstanding of the nature of the question framed for review in this matter, or the procedural posture of the case, Respondent supplements as follows the Board's statement of the factual and procedural background.

¹ Respondent City Disposal Systems, Inc., a Michigan corporation, is a wholly owned subsidiary of City Liquid Treatment And Reclamation, Inc., a privately held Michigan corporation; neither has non-wholly owned subsidiaries or affiliates.

1. Subject to the corrections provided hereafter, Respondent does not disagree with the recitation of the words and actions of employee James Brown on May 12 and 14, 1979 as set forth in the Board's Brief (at 3-4). Brown was indeed discharged by Respondent on May 14, 1979, following his words and actions, for the reason that he insubordinately refused a job assignment (J.A. 67). However, Respondent strenuously disagrees with the Board's characterization of Brown's words and actions throughout its argument. Brown's refusing to drive truck No. 244 (instead simply going home) and saying "I don't want to take the truck because the truck has got problems and I don't want to drive it" (Pet. App. 13a; J.A. 12) cannot fairly be described as "mak[ing] a claim" under the collective bargaining agreement (Board Brief at 20); or as "making a contract-based protest" (Board Brief at 23, 29); or as "serving notice" of a "relevant provision in the contract" (Board Brief at 25); or as "invoking" "collectively secured rights" (Board Brief at 27); or, finally, as "claim[ing] a right to refuse to operate truck No. 244" (Board Brief at 32).

By such characterizations, the Board is evidently attempting *factually* to convert or elevate Brown's bare refusal to perform assigned work into an actual "grievance" protesting a violation of the collective bargaining agreement.² The evidence in the record shows that this was not the case. Brown never mentioned the collective bargaining agreement or its article on vehicle safety, or any right provided therein; nor did he attempt to involve his union representative or initiate the grievance procedure until *after* his employment was terminated (Pet. App. 4a-5a, 14a-15a). That grievance protested a different action—his termination (J.A. 66). Brown simply refused to operate a truck that he *personally* did not

² Indeed, Amicus AFL-CIO's Brief (at 11-12), while avoiding the term "grievance," analyzes Brown's conduct as though factually it were precisely that.

want to drive, walked off the job, and went home. Respondent immediately terminated Brown, as a "voluntary quit," for walking off the job (J.A. 67).³

As will be shown herein, if Brown's conduct were indeed a "grievance" under the collective bargaining agreement, as the Board is attempting to suggest, the case would likely not be before this Court. Decisions of the Sixth Circuit and other Courts of Appeals have found the act of grieving protected by Section 7 without the need to utilize the fiction of "constructive" concerted activities raised by the Board in this case. See, e.g., *NLRB v. Ford Motor Co.*, 683 F.2d 156, 158 (6th Cir. 1982). The Sixth Circuit in this case held Brown's conduct unprotected and therefore unprotected because it was neither a "grievance" nor was it conduct "with the object of inducing or preparing for group action" (Pet. App. 4a). The question before this Court—which is a mixed one of fact and law—is whether Section 7 reaches so far beyond a contract "grievance" as to cover an individual employee's work stoppage occurring without any involvement of his union or other employees or any reference to collectively bargained procedures or rights.

2. While not directly at issue before this Court, Respondent provides the following additional information to assist the Court in understanding the factual circumstances in which the dispute leading to Brown's discharge arose, as well as the procedural posture in which the case comes to this Court.

According to Brown's testimony before the Administrative Law Judge, his refusal on Monday, May 14, 1979 to operate truck No. 244 as directed by Respondent was due to a brake problem truck No. 244 had experienced two days earlier on Saturday, May 12, 1979 (Pet. App.

³ Respondent disagrees with the Board's statement (Brief at 4) that Respondent's supervisors "allowed Brown to go home." Brown left in defiance of their order.

2a, 13a; J.A. 11-12). However, Brown also testified that when truck No. 244's brake problem was discovered on Saturday, May 12, 1979, Respondent's mechanics stated in Brown's presence that the problem "would be fixed over the weekend or by the first thing Monday morning" (Pet. App. 2a; J.A. 7-8). The record is devoid of any evidence that from Saturday, May 12, 1979 (when the brake problem was discovered) until mid-morning on Monday, May 14, 1979 (when Brown refused to operate truck No. 244), Brown ever looked at, inspected, or tested the truck, or in any fashion investigated to see whether truck No. 244's brakes had been repaired as the mechanics said they would be (J.A. 46, 48-49, 50). Indeed, Brown had not driven truck No. 244 for an entire year (J.A. 8, 14). Respondent's procedures required preliminary inspection and testing before taking a truck out on the road (J.A. 16, 48). After Brown's refusal, another driver operated truck No. 244, that same morning, without incident (Pet. App. 19a; J.A. 43).

Both Otto Jasmund and Robert Madary, Brown's supervisors who told him to drive truck No. 244, testified at the hearing before the Administrative Law Judge that Brown (who normally operated truck No. 245) stated he was refusing to drive truck No. 244 *not* because of any claimed problem with the brakes but because of a variety of other reasons. First, truck No. 244 was normally operated by employee Frank Hamilton (who had not come in to work that Monday). Second, truck No. 244 was less desirable than truck No. 245 due to its greater length and the requirement that a tarp be pulled over the trailer with each load—which meant Brown could not make as much incentive money driving truck No. 244 (J.A. 41-42, 50-51, 56-57).⁴ Furthermore, Madary

⁴ Although the ALJ found that Brown was an "unreliable witness" due to his criminal conviction for uttering and publishing (J.A. 68) and his evasiveness during cross-examination (Pet. App. 10a), the ALJ nonetheless credited Brown's version of the events

testified that Brown refused on various occasions to drive other trucks as assigned because of his "fondness" for truck No. 245 (J.A. 53); and that fictitious reports of truck malfunctions by drivers (who felt like going home rather than working)—when nothing was physically wrong with the truck—continually plagued Respondent (J.A. 54).⁵ Finally, one of Respondent's master mechanics, Keith Hall, testified that on the morning of May 14 Brown told a mechanic that he would not drive any truck other than No. 245 because it was a "special" unit; and that he would refuse to drive a truck with a long trailer (such as No. 244) because No. 245 was smaller and faster, easier to maneuver and unload, involved less work, and consequently permitted him to make more money (J.A. 56-58, 60).⁶

On this evidentiary record, the ALJ nevertheless held that on May 14 Brown had an "honest belief that the brakes on truck No. 244 were inadequate" based upon the problem that existed on May 12, and that this "honest belief" was the reason for Brown's refusal (Pet. App. 19a). The ALJ even purported to shift the burden of proof to Respondent by placing added reliance on the fact that Respondent had not, "by either word or demonstration," undertaken to disprove Brown's contention (Pet. App. 19a). Although not supported by any factual findings that Brown was aware of the collective bargaining agreement's provision on vehicle safety (Article XXI) (J.A. 64), or that he was asserting a right pursuant to that provision, or that truck No. 244 was indeed

of May 14 rather than that of Jasmund and Madary due to what he characterized as their demeanor and minor inconsistencies in their testimony (Pet. App. 13a-14a).

⁵ The ALJ did not deal with, or comment on, this testimony by Madary.

⁶ The ALJ did not deal with, or comment on, any of Hall's testimony at the hearing, which plainly corroborated Respondent's account of the motive for Brown's refusal.

unsafe, the ALJ found "constructive" concerted activity—based upon a principle generally known as the Board's *Interboro* doctrine⁷—and held that by refusing to drive truck No. 244, which he thought was unsafe, Brown was actually "asserting a right under Article XXI of the existing collective bargaining agreement" (Pet. App. 19a):

We have held in the past that when an employee makes complaints concerning safety matters which are embodied in a contract, he is acting not only in his own interest, but is attempting to enforce such contract provisions in the interest of all the employees covered under that contract. Such activity we have found to be concerted and protected under the Act, and the discharge of an individual for engaging in such activity to be in violation of Section 8(a)(1).

Relying upon *United Parcel Service*, 241 N.L.R.B. 1074 (1979), *enforcement denied sub nom. Kohls v. NLRB*, 629 F.2d 173 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931 (1981), the ALJ concluded that Brown's refusal was protected by Section 7 and that Respondent violated Section 8(a)(1) by terminating him.

3. Respondent thereupon filed two exceptions to the ALJ's Decision with the Board. First, Respondent challenged, essentially as a matter of law, the *Interboro* doctrine's notion of "constructive" concerted activity upon

⁷ See *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295 (1966), *enforced*, 388 F.2d 495, 500 (2d Cir. 1967), wherein the Second Circuit stated in the dictum of an alternative holding that individual "activities involving attempts to enforce the provisions of a collective bargaining agreement may be deemed to be for concerted purposes even in the absence of * * * interest by fellow employees." It is this dictum, in an expanded form, which has become known as the Board's *Interboro* doctrine. The ALJ actually cited *Roadway Express, Inc.*, 217 N.L.R.B. 278 (1975), *enforced without opinion*, 532 F.2d 751 (4th Cir. 1976), which applied this doctrine in the context of a truck driver's refusal to drive a truck he thought was unsafe.

which the ALJ's holding was predicated. Second, Respondent contended that, even if the Board's *Interboro* doctrine were a permissible interpretation of Section 7, Brown's conduct failed as a factual matter to fit within its acknowledged requirements. This was so because the substantial evidence in the record as a whole established that Brown's refusal to drive truck No. 244 on the morning of May 14, 1979 was neither motivated nor justified by an honest and reasonable belief that it was unsafe—in light of both the objective evidence surrounding his refusal and the ALJ's specific findings concerning Brown's lack of credibility.

In its Decision and Order (Pet. App. 7a-8a), the Board simply adopted the ALJ's analysis and rejected both of Respondent's exceptions. The Board noted, however, that the Sixth Circuit Court of Appeals had expressly disagreed with the Board in a similar case, *Aro, Inc. v. NLRB*, 596 F.2d 713 (6th Cir. 1979), *denying enforcement of* 227 N.L.R.B. 243 (1976), with respect to the nature of concerted activities protected by Section 7.

4. On Respondent's petition for review, in which the same two questions were raised, the Sixth Circuit denied enforcement of the Board's Order (Pet. App. 1a-5a). As it had done several times in the past, the Court again expressly rejected the Board's *Interboro* doctrine, finding a "tension between the *Interboro* doctrine and the plain language of Section 7" which "requires that an employee engage in 'concerted activities'" (Pet. App. 3a). The Court measured Brown's conduct by the Sixth Circuit's formulation of "concerted activities" in *Aro, Inc. v. NLRB*, *supra*, 596 F.2d at 718, which is comparable to the formulations utilized by other Courts of Appeals:

For an individual claim or complaint to amount to concerted action under the Act it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees or at

least be made with the object of inducing or preparing for group action * * * (Pet. App. 4a).

Reviewing the record, the Court found no evidence "that Brown acted or asserted an interest on behalf of anyone other than himself";⁸ or that he attempted to warn other employees; or that he was seeking the assistance of his union representative (Pet. App. 4a). Agreeing with a recent opinion by Judge Harry T. Edwards of the District of Columbia Circuit in an essentially identical case, *Kohls v. NLRB*, 629 F.2d 173 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931 (1981), *denying enforcement of United Parcel Service*, 241 N.L.R.B. 1074 (1979), the Sixth Circuit concluded that Brown's conduct was not concerted, and consequently was not protected by Section 7 (Pet. App. 5a).⁹

Having decided the case on a threshold legal point, the Sixth Circuit chose not to address the factual arguments raised by Respondent, i.e., that the substantial evidence in the record as a whole established that Brown's refusal to drive truck No. 244 was neither motivated nor justified by an honest and reasonable belief that the truck was unsafe (Pet. App. 5a). While the Court did not expressly set aside the Board's factual findings supporting its application of the *Interboro* doctrine, and in that sense "did not disturb them" (Board's Brief at 6), the Court did not in any fashion affirm them. This substantial

⁸ The Court noted that Brown had made an isolated remark about "put[ting] the garbage ahead of the safety of the men" (J.A. 12), but ruled that this vague comment was not substantial evidence of concertedness, and in any event had not been relied upon by the Board. Indeed, the Board has never proceeded in this case on a theory of "actual" concerted activities as opposed to "constructive" concerted activities under the *Interboro* doctrine.

⁹ The Court also concluded that Brown's grievance and consultation with his union representative *after* his termination to protest the termination "involved a different interest at a later time" and was not probative as to the concertedness of his earlier refusal to drive truck No. 244 (Pet. App. 4a-5a).

evidence question, see *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), is a preserved and presently unresolved issue. Thus, if this Court were to disagree with the Sixth Circuit on the threshold legal point concerning the validity of the Board's *Interboro* doctrine, a remand to the Sixth Circuit would be necessary so as to permit consideration of Respondent's other arguments.

SUMMARY OF ARGUMENT

By its terms, Section 7 protects "[e]mployees" who "engage in * * * concerted activities for the purpose of collective bargaining or mutual aid or protection." Employee James Brown refused to perform assigned work, and walked off the job. He asserted no contractual basis for leaving. He involved neither his union nor his fellow employees in his dispute with Respondent. Nevertheless, relying upon its *Interboro* doctrine, see *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295 (1966), enforced, 388 F.2d 495 (2d Cir. 1967), the Board contends that because Brown claimed the truck's brakes were unsafe before walking off the job, and because the subject of safety was addressed in the collective bargaining agreement, his individual conduct as a matter of law constituted "concerted activities" protected by Section 7.

A. Because the issue before the Court presents essentially a legal question of the Act's coverage, by which the Board seeks to move into a new area of regulation, the Board is not entitled to the deference its interpretation of the Act might be afforded if it were balancing conflicting interests within an arena clearly committed to it by Congress. See *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979).

B. The plain meaning of the phrase "concerted activities" does not permit the *Interboro* doctrine's fiction of "constructive" concerted activities. Section 7's language requires either actual group participation or conduct "engaged in with the object of initiating or inducing or preparing for group action or conduct that [has] some

relation to group action in the interest of the employees." See *Mushroom Transportation Company v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). This construction of Section 7 fully comports with the Act's purpose and at the same time preserves the integrity of its language. The Courts of Appeals, including even those few identified by the Board as accepting its *Interboro* doctrine, have consistently required conduct satisfying the *Mushroom Transportation* test as a factual predicate for concertedness. In this case, Brown's conduct failed to meet that test, as formulated by the Sixth Circuit in *Aro, Inc. v. NLRB*, 596 F.2d 713, 718 (6th Cir. 1979).

C. The Board bases its fiction of "constructive" concerted activities on two alternate theories or "nexuses": first, that any conduct which merely relates to a subject covered by a collective bargaining agreement is an "extension" of the earlier concerted activity that led to the agreement, and may consequently be deemed concerted; second, that conduct which relates to terms of employment may incidentally "affect" the interests of other employees, and accordingly may also be deemed concerted. Both theories ignore Section 7's two requirements—that there not only be "concerted activities" (i.e., a *means*) but also that such activities occur "for the purpose of collective bargaining or other mutual aid or protection" (i.e., a *purpose*). The Board's doctrine would delete Section 7's *means* requirement by focusing only on the *purpose* of the individual employee's conduct. The Courts of Appeals have uniformly rejected this view. See, e.g., *NLRB v. Northern Metal Company*, 440 F.2d 881, 884 (3d Cir. 1971); *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 845 (2d Cir. 1980). The Board's theories have found a measure of judicial acceptance *only* in a single factual situation which, most significantly, does not require a legal fiction to produce concertedness: where an individual employee actually grieves a violation of the collective bargaining agreement and receives discipline

for so doing. See, e.g., *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967); *NLRB v. Selwyn Shoe Manufacturing Corporation*, 428 F.2d 217 (8th Cir. 1970); *NLRB v. Ben Pekin Corporation*, 452 F.2d 205 (7th Cir. 1971). In this case, Brown did not grieve or do anything which could be characterized as grieving. He was discharged for walking off the job. No Court of Appeals has ever agreed with the Board's fiction of "constructive" concerted activities on such facts. See, e.g., *Kohls v. NLRB*, 629 F.2d 173 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931 (1981); *NLRB v. C & I Air Conditioning, Inc.*, 486 F.2d 977 (9th Cir. 1973).

D. The Board mistakenly suggests that the Act's legislative history supports its construction of Section 7, under which a remote theoretical nexus is said to bring purely individual conduct within its protection. The entire thrust of the Act, however, was to promote and protect *collective* and *concerted* activities—by subordinating and extinguishing *individual* interests—and by so doing to equalize the bargaining power of employees vis-a-vis their employer. See *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). This Congressional intent is also evidenced by Section 7's terminology protecting only "[e]mployees" engaging in "concerted activities," whereas comparable provisions of antecedent labor statutes explicitly covered both individual and concerted activities. See Sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52; and Sections 2, 4, and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 102, 104, 113.

E. The Board's construction of Section 7 not only does violence to its language and legislative history, but also does violence to fundamental national labor policy favoring the resolution of labor disputes through private grievance arbitration. See Section 203(d), 29 U.S.C. § 173(d); *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960). The result the Board seeks encourages

individual work stoppages as an alternative to contractual grievance arbitration. Even more threatening to national labor policy, however, is the Board's acknowledged purpose of doing away with collectively bargained contract provisions which the parties intended to control the dispute at issue. The contract under which Brown worked sanctioned a refusal to drive a truck for safety reasons only where it was objectively "justified." The Board unabashedly ignored this contractual standard and substituted, as a matter of law, its own inquiry of whether he had an "honest and reasonable belief that the truck was unsafe." See *American Freight Systems, Inc.*, 264 N.L.R.B. No. 18, 111 L.R.R.M. 1385 (1982). Thus, the Board's doctrine impermissibly deprives contracting parties of their collectively bargained language, as well as their arbitrator, see *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 582 (1960), and creates an unnecessary addition to an existing multiplicity of remedial structures.

That safety considerations may be involved in this case cannot alter the basic inquiry as to the construction and meaning of "concerted activities" in Section 7. Moreover, the safety concerns of employees in the workplace have been amply addressed by collectively bargained contractual provisions, as well as a variety of statutory protections. See Section 502 of the Act, 29 U.S.C. § 143; *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974). See also the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*; *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980). There need be no abstract concern that, without the Board's *Interboro* doctrine, employees such as Brown are left unprotected.

ARGUMENT

The Board's Expansive Interpretation Of Section 7 Impermissibly Extends Section 7 Beyond Both Its Plain Language And Congressional Intent, And Undermines National Labor Policy Favoring Dispute Resolution Through Private Grievance Arbitration

A. Inasmuch as the Board's Interboro Doctrine Raises A Question Of The Act's Coverage, The Deference Accorded The Board In Other Contexts Does Not Apply Here

As a preliminary matter, it should be noted that the determination of the scope of the "concerted activities" clause in Section 7 is essentially a jurisdictional or legal question concerning the coverage of the Act. See, e.g., *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 310 (4th Cir. 1980) ("concerted activity" is an essential predicate, in effect a jurisdictional requirement, for Board action under the Act * * *); *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 719 (5th Cir. 1973). As such, and contrary to the Board's suggestion (Brief at 15), this Court is not required to adopt the Board's view of Section 7 merely because it might arguably be perceived as "defensible" or "rational." This Court's review is not thus restricted.

Although the Court has observed that the Board is entitled to a measure of deference in circumstances where it balances conflicting interests or formulates technical rules within a complex arena plainly governed by the Act, see, e.g., *Charles D. Bonnano Linen Service v. NLRB*, 454 U.S. 404, 413-416 (1982); *NLRB v. Ironworkers*, 434 U.S. 335, 350 (1978); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963), the Court has never hesitated to reject the Board's application of the Act where it has disregarded "plain language" and its "ordinary meaning," *Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157, 166 (1971); where it rested on an "erroneous legal

foundation," *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956); where the Board's interpretation was "fundamentally inconsistent with the structure of the Act" and an attempt to usurp "major policy decisions properly made by Congress," *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965), or where the Board had moved "into a new area of regulation which Congress had not committed to it." *NLRB v. Insurance Agents*, 361 U.S. 477, 499 (1960). See generally *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979).

An unrestricted standard of review clearly applies to this Court's consideration of the question presented here, and the Board's view is entitled to no deference, because the Board's interpretation of the words "concerted activities" reads out of Section 7 an unambiguous limiting term chosen by Congress, and moves the Board into an entirely new area of regulation—*individual* activity "for the purpose of collective bargaining or mutual aid or protection"—which Congress plainly has not committed to it. As will be shown, if Congress had intended to cover such *individual* activity, it surely would not have used the words "concerted activities."

B. The Board's Interboro Doctrine Effectively Deletes The Term "Concerted" From Section 7

The portion of Section 7 pertinent to this case is as follows:

*Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * ** (Emphasis added).

1. The Board's Brief (at 12) acknowledges that its *Interboro* doctrine deals with factual circumstances involving "an employee acting alone"; thus, there are no *actual* "concerted activities" in which the employee physically "engage[s]." The Board's argument accordingly

concedes that the literal language and requirement of Section 7—that the employee “engage in . . . concerted activities”—is not met under any customary understanding or definition of these terms. Indeed, Webster’s Third New International Dictionary of the English Language (Unabridged 1976) defines “concerted” as “mutually contrived or planned: agreed upon” or as “performed in unison: done together.” Black’s Law Dictionary (5th ed. 1979) similarly defines “concerted action (or plan)” as “[a]ction that has been planned, arranged, adjusted, agreed on and settled between parties acting together pursuant to some design or scheme.” This Court made clear in a comparable context involving the Act itself, in *NLRB v. Rice Milling Co.*, 341 U.S. 665, 671 (1951), that Congress’ use (in the original Section 8(b)(4)) of the language “concerted, as distinguished from individual, conduct” established an activity threshold for the Act’s coverage.

It is precisely this failure of the Board’s *Interboro* doctrine to comply with the plain meaning of the statutory language which has led most of the Courts of Appeals flatly to reject it as a clear and unwarranted “expansion of the Act’s coverage, in the face of unambiguous words in the statute,” resulting in the creation of a “legal fiction.” *NLRB v. Northern Metal Company*, 440 F.2d 881, 884 (3d Cir. 1971). See *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 719 (5th Cir. 1973); *Aro, Inc. v. NLRB*, 596 F.2d 713, 717 (6th Cir. 1979); *Royal Development Co. v. NLRB*, 703 F.2d 363, 373-374 (9th Cir. 1983); *Roadway Express, Inc. v. NLRB*, 700 F.2d 687, 693-694 (11th Cir. 1983); *Kohls v. NLRB*, 629 F.2d 173, 176-177 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931 (1981) (severely questioning validity of *Interboro* doctrine and denying enforcement because factual foundation was in any event absent).¹⁰

¹⁰ In *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 307-309 (4th Cir. 1980), the Fourth Circuit expressed strong dis-

2. However, the Courts of Appeals have recognized that an excessively literal approach to Section 7's concertedness requirement may not comport with the Act's purposes and may unduly inhibit incipient organizational activity by individual employees. The Courts have accordingly utilized a test originally formulated several years before *Interboro* by the Third Circuit in *Mushroom Transportation Company v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964), which addresses that concern but still preserves the integrity of the word "concerted" placed by Congress in Section 7:

It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was *engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.*

This is not to say that preliminary discussions are disqualified as concerted activities merely because they have not resulted in organized action or in positive steps toward presenting demands. We recognize the validity of the argument that, inasmuch as almost any concerted activity for mutual aid and protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition. However, that argument loses much of its force when it appears from the conversations themselves that no group action of any kind is intended, contemplated, or even referred to.

Activity which consists of mere talk must, in order to be protected, be talk looking toward group action.

agreement with the *Interboro* doctrine's rationale and refused to apply it in a case which did not involve a collective bargaining agreement. At present it appears that only the First Circuit and the Tenth Circuit have not addressed the *Interboro* doctrine.

If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere "gripping." *Id.* at 685 (emphasis added).

The Sixth Circuit's statement in *Aro, Inc. v. NLRB*, *supra*, which was utilized in the instant case, paraphrases the *Mushroom Transportation* test and captures its meaning by requiring that an individual's action or complaint must not have been taken or "made solely on his own behalf," but must have been taken or "made on behalf of other employees or at least be made with the object of inducing or preparing for group action * * *." 596 F.2d at 718.¹¹

It is most significant that those Courts of Appeals which the Board identifies as accepting its *Interboro* doctrine have, as will be shown in detail *infra*, in every such case invoked the doctrine in circumstances actually satisfying the *Mushroom Transportation* test.

The Sixth Circuit held in the instant case that Brown's conduct did not satisfy the *Aro* or *Mushroom Transportation* test, and this holding is factually consistent with those of other Courts of Appeals. The Board does not disagree with this conclusion, but instead argues that the *Mushroom Transportation* test fails to "appreciate either the importance of a collective bargaining agreement to individual employees or the ways in which a collective bargaining agreement is translated from mere paper

¹¹ In cases involving complaints under collective bargaining agreements, the Sixth Circuit also requires that they have some "arguable basis" in the agreement. 596 F.2d at 718. This condition, of course, does not limit the concept of "concertedness," and the Sixth Circuit does not apply it in unorganized settings, i.e., where conduct has no relation to a collective bargaining agreement. See, e.g., *Timet, A Div. of Titanium Metals, Etc. v. NLRB*, 671 F.2d 973, 974 (6th Cir. 1982).

promises into a reality in the workplace" (Board Brief at 15).¹² To the contrary, however, the Courts fully "appreciate" the role and importance of collective bargaining agreements, but also recognize the clear limitations Congress placed in Section 7. Moreover, as will also be shown *infra*, the collective bargaining interests with which the Board is ostensibly concerned are better effectuated without the *Interboro* doctrine.

C. The Board's Theories For Linking Individual Activity To Collective Bargaining Or Group Concern Are Merely Remote Theoretical Nexuses Which The Courts Have Consistently Rejected

The Board advances two theories or "nexuses" which are said to justify bringing individual activity not meeting the *Mushroom Transportation* test within the scope of "concerted activities" protected by Section 7:

[First,] the assertion of a right in a collective bargaining agreement is an *extension* of the concerted activity that gave rise to the agreement in the first place

and

[Second,] the claim based on the contract necessarily *affects* the rights and interests of all the other employees in the bargaining unit (Board Brief at 13-14, emphasis added).

1. It is readily apparent that both of these "nexuses" to concerted activities involve only indirect and remote theoretical linkages: either an "extension" to a *prior* group activity or an "effect" on unspecified *subsequent* group activity. In the present case there is no evidence

¹² The Board also argues (Brief at 26-27) that the *Mushroom Transportation* test turns upon such "fortuities" as the number of employees involved in the activity, thereby creating "loopholes" in the Act's coverage. This contention clearly begs the very question under consideration here: Whether the Act's coverage was limited in that fashion by the inclusion of the term "concerted."

that Brown's conduct had any actual relation to prior activity leading to the collective bargaining agreement; nor is there evidence that his conduct affected other employees except in the most conjectural sense.

Further, and more importantly, it is evident that both of the Board's nexuses are directed only at the two "purpose" clauses of Section 7:

Employees shall have the right * * * to engage in
* * * concerted activities

for the *purpose* of collective bargaining or other
mutual aid or protection * * * (emphasis added).

Neither nexus focuses on, or in any sense deals with, the "means" or "conduct" clause which requires "[e]mployees" to "engage in * * * concerted activities * * *" for a designated "purpose." Thus, the Board's interpretation either ignores the term "concerted" altogether, thereby deleting it from the statute, or it creates an obvious redundancy in the statute by treating as "concerted" any individual activity which meets the requirements of the "purpose" clauses. As Professors Gorman and Finkin have explained in *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U.Pa.L.Rev. 286, 299 (1981):

[Section 7] protects "concerted activity" which has as its purpose the "mutual aid and protection" of employees. Congress apparently contemplated concerted activity as the *means* and improvement of working conditions as the *purpose*. By defining concerted activity as conduct, even by an individual, which has some general improvement in working conditions as its purpose, the Board has in effect read out of section 7 the apparent requirement that the *means* be somehow concerted. It has substituted the independent requirement of concerted benefits for that of concerted activity, creating a redundancy in the Act (emphasis in original).

See also *Northern Metal Company*, *supra*, 440 F.2d at 884 ("The Act surely does not mention 'concerted purposes'"); *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 845 (2d Cir. 1980) ("Not only must the ultimate 'objective' be mutual but the activity must be 'concerted'").¹³

Whether judged as working a deletion or a redundancy, the Board's treatment of the term "concerted" radically modifies Section 7 by removing an express limitation and expanding the coverage of the Act to any type of individual or group activity which merely satisfies the requisite "purpose." And indeed, the Board's recent decisions beginning with *Alleluia Cushion Co.*, 221 N.L.R.B. 999, 1000 (1975), as well as its Brief in this Court (at 24 n. 13), make very clear that this is precisely the Board's reading of Section 7. In *Air Surrey Corp.*, 229 N.L.R.B. 1064 (1977), *enforcement denied*, 601 F.2d 256 (6th Cir. 1979), the Board stated the view that:

[A]n individual's actions may be considered to be concerted in nature if they relate to conditions of employment that are matters of mutual concern to all the affected employees. 229 N.L.R.B. at 1064.

Similarly, in *Ontario Knife Co.*, 247 N.L.R.B. 1288, 1289 (1980), *enforcement denied*, 637 F.2d 840 (2d Cir. 1980), the Board found that an employee's "individual protest was protected because it involved a group concern." Thus, the Board's view of Section 7 would transform into protected "concerted activities" any individual word or action which merely pertains in a theoretical sense to wages, hours, or terms or conditions of employment.¹⁴

¹³ Cf. *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 500 (2d Cir. 1967) (attempt to enforce the provisions of a contract may be deemed for "concerted purposes"). This unexplained use of the expression "concerted purposes" in the Second Circuit's *Interboro* opinion is clarified by its recent statement in *Ontario Knife*.

¹⁴ Even the Board has recently recognized, and possibly retreated from, the extremity of this construction of Section 7. In

2. Every Court of Appeals which has considered the Board's essentially unlimited definition of "concerted activities" or either of its two nexuses—including the Second, Seventh, and Eighth Circuits identified by the Board as accepting the *Interboro* doctrine—has rejected it as plainly beyond the language and intent of the Act,¹⁵ except, as will be shown, in the single context of an employee's actual *grievance* under the contract. Most significantly, the three Circuits which have purported to accept the Board's *Interboro* doctrine, or have seemingly given approval to either of the Board's theories or nexuses, have done so *only* where the individual employee had actually filed a *grievance* under the collective bargaining agreement. Thus, in *NLRB v. Selwyn Shoe Manufacturing Corporation*, 428 F.2d 217 (8th Cir. 1970), the Eighth Circuit adverted to the Board's first nexus—i.e., that the asserting of contract rights is an extension of the concerted activity that gave rise to the contract—but it did so in the context of an employee's discharge for presenting a grievance. The Court held: "The submission of a grievance based on the collective

Comet Fast Freight, Inc., 262 N.L.R.B. No. 40, 110 L.R.R.M. 1321 (1982), the Board held that a driver's refusal to drive a truck for alleged safety reasons was not "concerted" because other drivers did not mind driving it. The factual similarity but legal polarity between *Comet Fast Freight* and the instant case are striking—which either shows a substantial clouding of the Board's position in such cases or, as Board Member Howard Jenkins stated in dissent in *Comet*, the decision "reverses many years of Board precedent." 110 L.R.R.M. at 1323.

¹⁵ *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 845 (2d Cir. 1980); *NLRB v. Northern Metal Company*, 440 F.2d 881, 884 (3d Cir. 1971); *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 307 (4th Cir. 1980); *NLRB v. Datapoint Corp.*, 642 F.2d 123, 128 (5th Cir. 1981); *Jim Causley Pontiac v. NLRB*, 620 F.2d 122, 126 n.7 (6th Cir. 1980); *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23, 29 (7th Cir. 1980); *NLRB v. Dawson Cabinet Co., Inc.*, 566 F.2d 1079, 1083-1084 (8th Cir. 1977); *NLRB v. Bighorn Beverage*, 614 F.2d 1238, 1242 (9th Cir. 1980); *Roadway Express, Inc. v. NLRB*, 700 F.2d 687, 693-694 (11th Cir. 1983).

bargaining agreement cannot be the basis for discharge." *Id.* at 221 (emphasis added).

The Seventh Circuit alluded to the Board's second nexus—i.e., that the affect on other employees of the individual employee's conduct renders the conduct concerted—in *NLRB v. Town & Country LP Gas Service Co.*, 687 F.2d 187 (7th Cir. 1982). But the Court explicitly premised its holding on the fact that the employer had laid off and then discharged the employee due to his actual presentation of a grievance:

This [concerted activities] requirement may be satisfied by proof that an individual employee was attempting to enforce provisions of a collective bargaining agreement *by way of the grievance procedure*, to the extent that such conduct touches on the collective interests of bargaining unit members. *Id.* at 191 (emphasis added).

The pivotal factors in every other Court of Appeals decision in which the *Interboro* doctrine has been given approval, or either of the Board's two nexuses has been invoked, have been (1) that the individual employee actually grieved and (2) that the employer's disciplinary action was grounded thereon. See *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967) (two employees grieved a number of contract violations and brought their union representative directly into the disputes, for which they were discharged); *NLRB v. John Langenbacher Co.*, 398 F.2d 459 (2d Cir. 1968), *cert. denied*, 393 U.S. 1049 (1969) (three employees grieved and brought their union into a contractual pay dispute, for which they were discharged); *NLRB v. Ben Pekin Corporation*, 452 F.2d 205 (7th Cir. 1971) (a janitor grieved a pay shortage, which led to a meeting of all the janitors and their union representatives, for which the janitor was discharged).¹⁸

¹⁸ In *Interboro*, *Langenbacher*, and *Ben Pekin* the individual grievants also involved other employees, as well as their union

3. There can be little doubt that the actual presentation of a grievance by these individual employees itself satisfied the *Mushroom Transportation* test, because grieving is "initiating or inducing or preparing for group action." As the Board correctly points out in its Brief (at 20), no Court questions that an individual employee engages in protected concerted activity by filing an individual grievance under the collective bargaining agreement—including the Sixth Circuit. See *NLRB v. Ford Motor Co.*, 683 F.2d 156, 158 (6th Cir. 1982) ("When . . . protest [concerning terms and conditions of employment] is in the form of a grievance, filing of the grievance is a protected Section 7 activity"). See also *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 260 (1975) ("The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7 . . ."); *Garment Workers v. Quality Mfg. Co.*, 420 U.S. 276, 280 n. 2 (1975). As the Ninth Circuit aptly observed in *NLRB v. Adams Delivery Service, Inc.*, 623 F.2d 96, 100 (9th Cir. 1980): "Where an employee enlists the aid of the union to enforce a contractually-guaranteed employment right, the need to employ a fiction of group activity vanishes."

In the present case, it is undisputed that Brown did not present or even attempt to present a grievance under the contract concerning the work assignment; indeed, there is no evidence that he even knew of its vehicle safety provisions until after his employment terminated.¹⁷ He did

representatives, as actual participants; accordingly their conduct was literally concerted. Thus, the utilization of the *Interboro* doctrine's fiction of "constructive" concerted activities was unnecessary, and plainly dictum, in each of these cases.

¹⁷ The Board's statement (Brief at 25) that an "employee cannot be expected to assert his claim with the precision of a lawyer," citing *Love v. Pullman*, 404 U.S. 522, 526-527 (1972), presupposes that Brown did "assert a claim," as Love did in writing in that case. Brown did not. He simply refused to do his job as assigned, and went home. Only by the Board invoking additional presumptions

not seek in any fashion to involve his union representative. He did not "serv[e] notice" (Board Brief at 25) of a claimed contract violation on anyone. He simply refused his employer's order to operate truck No. 244, and walked off the job. Respondent discharged Brown for walking off the job—not for grieving.

4. The Board asks this Court to make an extraordinary leap from existing judicial precedent by holding this type of conduct concerted and protected against employer discipline. Every Court of Appeals which has reviewed conduct of this character has, like the Sixth Circuit in the instant case, refused to find it concerted even though a contract clause could be said theoretically to touch upon the work the employee refused to perform. Thus, in *NLRB v. C & I Air Conditioning, Inc.*, 486 F.2d 977, 978-979 (9th Cir. 1973), denying enforcement of 193 N.L.R.B. 911 (1971), the Ninth Circuit rejected the Board's contention that an individual employee's quitting work for claimed safety reasons was concerted, adopting the dissenting view of then Board Chairman Edward B. Miller (193 N.L.R.B. at 912):

I find my colleagues' decision here to go considerably beyond the decision in [*Interboro*]. In *Interboro* the discharged individual designated the collective-bargaining agreement as the source of his claimed rights. In the present case . . . [t]here is no evidence he made any reference to the collective-bargaining agreement, or even that he knew there was one, or that he was seeking in any way to imple-

or fictions (in addition to the fiction of "extension of the contract" or "group effect") that the employee knows of the appropriate contract clause, that he intends to rely on it, and that his employer comprehends this, see, e.g., *John Sexton & Co.*, 217 N.L.R.B. 80 (1975), can conduct like Brown's be transformed into the "assertion of a contract claim." The propriety of the Board's making presumptions of this character has been critically questioned. See, e.g., *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 309-310 (4th Cir. 1980).

ment its terms * * *. The majority's opinion demonstrates only that Martin *might* have taken concerted action, or *might* have made a claim under the collective-bargaining agreement, had he thought of it. But the fact is there is no evidence that he did. Under these circumstances, the finding that the employee's complaints were "concerted" activity is based upon such remote and unsupported inferences that I must dissent * * *.

See also *Kohls v. NLRB*, 629 F.2d 173, 177 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931 (1981) (refusal to drive allegedly unsafe truck, on facts essentially identical to those here); *Bay-Wood Industries, Inc. v. NLRB*, 666 F.2d 1011 (6th Cir. 1981) (refusal to operate saw); *United Parcel Service v. NLRB*, 654 F.2d 12 (6th Cir. 1981) (refusal to operate trailer door). Cf. *NLRB v. Marsden*, 701 F.2d 238, 243 (2d Cir. 1983) ("[t]he walkout here expressed no such grievance but was merely an *ad hoc* reaction to one day's [working conditions]"). To hold Brown's conduct concerted would also give sanction to individualized work stoppages which, by avoiding contractual grievance arbitration procedures, do nothing to advance and actually undermine the cause of collective bargaining and the resolution of labor disputes.

5. The rationale of the decisions which hold that a discharge because of the filing of a grievance is a discharge because of protected concerted activities, must be kept in mind. Those decisions do not hold that the mere expedient of filing a grievance, in conjunction with a refusal to work, makes a discharge for the refusal to work unlawful. Instead, those decisions focus on the employer's reason for discharging the employee.

Thus, if an employee walks off the job because he does not like the work assigned to him, and is discharged, the discharge would, without more, unquestionably *not* be unlawful under the Act. Assume that the employee does not like the work and walks off the job, but while departing

he hands his employer a grievance stating he does not like the work, and he is then discharged. Does a discharge for walking off the job under these circumstances automatically become unlawful because a grievance was handed to the employer? Respondent emphatically says no. The focus, of course, is on the employer's reason for discharging the employee. See *NLRB v. Transportation Management Corp.*, 51 U.S.L.W. 4761 (June 5, 1983). If the discharge occurs because the employee walked off the job, then the employer has reacted understandably and lawfully. If, however, the employer cares not about the work stoppage but rather is outraged by being handed a grievance—perhaps he dislikes the “hassle” of processing grievances—and discharges the employee for the act of grieving, then the discharge has become unlawful.

In the instant case, Brown's failure to refer to the contract or assert a contractual basis for his walking off the job—as opposed to grieving the work assignment by word or action—is in Respondent's view not the only issue of significance. What is equally if not more significant is that Respondent did *not* discharge Brown for the act of complaining about an undesirable work assignment, but rather because he insubordinately walked off the job. A discharge for that reason, unless it is otherwise concerted by reason of group participation, e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), is not unlawful under the Act because it is not on account of concerted activity. In contrast, a discharge for the act of grieving is a discharge in retaliation for actually engaging in concerted activities. Cf. *Garment Workers v. Quality Mfg. Co.*, 420 U.S. 276, 280-281 (1975).

The time-honored maxim “obey and grieve” finds application in this circumstance. The Board's response to this principle that it would be unreasonable or unfair to require an employee to work in a safety situation (Brief at 32) misses the point entirely. We must return to an examination of the statutory language, i.e., what are

"concerted activities"? The question is whether Brown's conduct—however it be characterized—was concerted so as to be protected by Section 7. Brown's reasonableness or Respondent's asserted unfairness¹⁸ divert attention from the issue. The statutory language cannot change merely because an employee's actions may relate to a safety issue, as opposed to an unpleasant work issue. Moreover, as will be shown *infra*, the concern that employees should not be required to work in an unsafe environment has been addressed by Congress in legislation which specifically deals with an individual employee's right to refuse unsafe work.

6. In summary, the two theories or "nexuses" urged by the Board to justify its *Interboro* doctrine are precisely that: just theories. They purport to infuse a purely individual word or action with the concertedness of prior or subsequent group action, by means of remote theoretical linkages. By so doing, they expand the reach of Section 7 far beyond its plain meaning, and either excise the term "concerted" from the Act altogether or create a plain redundancy. No Court of Appeals has ever accepted the Board's theories—except in the single situation where an employer disciplines an individual employee for presenting a grievance under the collective bargaining agreement. But use of a fiction is unnecessary there because such conduct meets the *Mushroom Transportation* test. Neither Brown's conduct nor Respondent's response present that situation. Brown did nothing that constituted grieving; more importantly, though, even if he had done so, Respondent discharged him solely for walking off the job.

¹⁸ When it passed the Act in 1935, Congress admonished that "[n]either the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair." S. Rep. No. 573, 74th Cong., 1st Sess. 8 (1935).

The Board seeks a vast expansion of existing judicial precedent. The Fifth Circuit recently observed in *NLRB v. Datapoint Corp.*, 642 F.2d 123, 129 (5th Cir. 1981):

The Board asks us to set too far-reaching a precedent, one by which virtually any action taken by a single employee in any way related to wages, hours, or the terms and conditions of employment would be considered protected concerted activity. If Congress had intended Section 7 to be read so broadly, it certainly could have done so with much more definite language, and courts would have discovered that intent long ago.

As will be shown next, ample evidence exists that Congress intended by the use of the words "concerted activities" to limit the coverage of Section 7. Congress plainly did not intend it to reach purely individual activity which merely has a remote theoretical nexus to concerted activities occurring before or after the individual activity "engage[d] in" by the employee. While the Board may believe that the goals of the Act are furthered by its expanding Section 7 (Board Brief at 19-26), it is the role of Congress to make such policy decisions.¹⁹

¹⁹ In this connection, a recent decision of this Court is instructive. In *Edward J. DeBartolo Corp. v. NLRB*, 51 U.S.L.W. 4984, 4986 (June 24, 1983), the Board had applied an analysis of the "distribution" requirement of the publicity proviso to Section 8(b)(4) of the Act, 29 U.S.C. § 158(b)(4), which nullified the requirement in practically every case. In rejecting the Board's interpretation, this Court stated in language equally appropriate here:

That form of analysis would almost strip the distribution requirement of its limiting effect. It diverts the inquiry away from the relationship between the primary and secondary employers and toward the relationship between two secondary employers. It then tests the relationship by a standard so generous that it will be satisfied by virtually any secondary employer that a union wants consumers to boycott. Yet if Congress had intended all peaceful, truthful handbilling that informs the public of a primary dispute to fall within the proviso, the statute would not have contained a distribution requirement.

D. The Act's Legislative History Buttresses The Courts Of Appeals' View That Section 7 Was Not Intended To Reach Individual Activity

The Board argues that the Act's legislative history suggests that, when the Wagner Act was passed in 1935, Congress was simply attempting to expand the rights of an individual employee vis-a-vis his employer (as opposed to limiting the Act's protection to actual concerted activities) "so long as the [individual] employee's conduct has a reasonable nexus to collective action" (Board Brief at 18-19). The Board cites Gorman & Finkin, *The Individual and the Requirement of "Concert" Under The National Labor Relations Act*, 130 U.Pa.L.Rev. 286, 331-338 (1981), as authority for this view—which focuses on the use of the term "concerted" in certain statutes which were historical antecedents to the 1935 Wagner Act. Thus, Professors Gorman and Finkin contend that Congress essentially borrowed the term "concerted" from the criminal conspiracy and antitrust laws, and inserted it into the Wagner Act where it was not consciously intended; consequently, they posit, the term and the limiting concept of "concerted activities" in Section 7 should be excised or disregarded.²⁰

This view of the Wagner Act does not withstand scrutiny. It is true that the criminal conspiracy and antitrust laws provided an historical backdrop for the Wagner Act; it is likewise true that the Wagner Act removed any doubt that employers no longer possessed the "conspiracy weapon." See *Automobile Workers v. Wisconsin Board*, 336 U.S. 245, 257-258 (1949). But this superficial focus ignores two critical facts which are plainly revealed both in the Wagner Act's legislative history and

²⁰ It is noteworthy that, while the Board adopts some of the argument of Professors Gorman and Finkin, the Board does not adhere to their conclusion, and has always interpreted Section 7 to require either actual or constructive concerted activities.

in the language Congress selected for its principal sections.

1. The fundamental purpose of the Wagner Act was to promote and protect *concerted* or *collective* activities of employees as a means of reducing labor strife, based upon Congress' articulated determination that *individual* activity was futile in the face of large industrial employers. During the consideration of the Wagner bill in 1935, Senator Wagner stated:

Now, it was perfectly obvious to every observer of modern large-scale enterprise that it would be impossible for employees individually to deal directly with their employers. One cannot imagine an isolated worker cooperating with the United States Steel Corporation. 79 Cong. Rec. 6184 (1935).

Senator Wagner opened the 1935 Senate debate on the bill with the following remarks:

In this modern aspect of a time-worn problem the isolated worker is a plaything of fate. Caught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise, he can attain freedom and dignity only by cooperation with others of his group. 79 Cong. Rec. 7565 (1935).

The Senate Report accompanying the bill identified as a major objective the equalization of bargaining power, through *collective* bargaining, because of the "relative weakness of the isolated wage earner caught in the complex of modern industrialism * * *." S. Rep. No. 573, 74th Cong., 1st Sess. 3 (1935). Congress thus recognized that only by promoting and protecting *collective* activities—as an alternative to *individual* activity—could it improve the lot of employees generally. The Act's statement of policy in Section 1 makes plain that objective; it contains no reference to individual employee activity.

Indeed, throughout the history of the Act this Court has recognized the promotion and protection of *collective*

activity as the fundamental purpose underlying the Act. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-34, 42 (1937); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979). In *Vaca v. Sipes*, 386 U.S. 171, 182 (1967), the Court stated:

The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining. . . . The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit.

The Court added in *NLRB v. Allis Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967):

[National labor] policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.

See also *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50, 62-63 (1975).

In this light, it misapprehends the entire thrust of the Wagner Act to suggest that Congress intended the same form of protection for "individual activity" as for "concerted activities." The purpose and effect of the national labor policy created and fostered by the Act are to promote and protect collective and concerted activities by consciously subordinating individual activity and individual interest.

2. A comparison between the language of the Wagner Act and that of the antecedent statutes upon which Professors Gorman and Finkin's "borrowing" theory is based reveals radical and highly significant wording differences. These differences—which follow a consistent theme—not only substantiate the view that the Wagner Act's

purpose was to protect concerted activities, in contradistinction to individual activity, but also refute any suggestion that the term "concerted" was inadvertently included in Section 7.

Section 7 is phrased exclusively in the plural: "*Employees* shall have the right . . . to engage in . . . *concerted activities*" (emphasis added). However, the proviso to Section 9(a), 29 U.S.C. § 159(a), which was added to ameliorate certain effects of the majority rule principle, provides: "That *any individual employee or group of employees* shall have the right at any time to present grievances to their employer . . ." (emphasis added).²¹ Thus, Congress manifestly knew how to provide for individual activity where it found such coverage appropriate.

In sharp contrast to Section 7, every one of the antecedent statutes evinces an intent to cover or protect *both individual and concerted* activities. Section 6 of the Clayton Act of 1914, 38 Stat. 730, 15 U.S.C. § 17, speaks of "individual members" of labor organizations; Section 20 of the Clayton Act, 29 U.S.C. § 52, directs that no "restraining order or injunction shall prohibit any person or persons, whether singly or in concert," from engaging in certain activities.

Most strikingly different is the language of the Norris-LaGuardia Act of 1932, 47 Stat. 70, 29 U.S.C. § 101 *et seq.* Section 2 of that statute, 29 U.S.C. § 102, contains the same phraseology which appeared three years later

²¹ The Board has acknowledged, see *Colonial Stores, Inc.*, 248 N.L.R.B. 1187, 1188 n.7 (1980), as does its Brief in this Court (Board Brief at 22-23 n.10), that the proviso to Section 9(a) does not furnish a basis for its *Interboro* doctrine. The proviso was added merely to remove a prohibition against an employer's processing grievances from individual employees, rather than to create any substantive right. See *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50, 61 n.12 (1975); Cox, *Rights Under A Labor Agreement*, 69 Harv. L. Rev. 601, 622-624 (1956).

in Section 7 of the Wagner Act ("other concerted activities for the purpose of collective bargaining or other mutual aid or protection") but it is preceded by "the individual * * * worker * * *," whereas Section 7 of the Wagner Act substitutes the plural form "[e]mployees." In the same vein, Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, bars the federal courts from issuing any restraining order or injunction in any case—

involving or growing out of any labor dispute to prohibit any person or persons * * *, whether singly or in concert, * * *

from engaging in certain described activities. Section 13 of the Norris-LaGuardia Act, 29 U.S.C. § 113, uses the phrase "one or more employees" in defining a labor dispute. The same term is defined in the Wagner Act using the plural "persons." See Section 2(9), 29 U.S.C. § 152 (9).

The Wagner Act's consistent use of plural terminology in Section 7—contrasted with the singular and plural terminology utilized in the Clayton Act and the Norris-LaGuardia Act—is highly significant and cannot be overlooked. This is particularly so because Section 2 of the Norris-LaGuardia Act is an acknowledged antecedent of Section 7 of the Wagner Act. See S.Rep. No. 573, 74th Cong., 1st Sess. 9 (1935); H.R.Rep. No. 1147, 74th Cong., 1st Sess. 15 (1935); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 n.14 (1978).

In this historical framework, it cannot be said that Congress merely borrowed unthinkingly the language "concerted activities" while intending the same protection for individual activity. Congress explicitly chose to protect only "concerted activities"; only Congress can delete that limiting term from Section 7. Thus, the Act's legislative history is plainly inconsistent with the

hypothesis offered by Professors Gorman and Finkin and relied upon by the Board.²²

E. The Board's Interboro Doctrine Ultimately Undermines The Act's Policy Favoring Dispute Resolution Through Private Grievance Arbitration, By Interjecting The Board Into Contractual Matters, Abrogating Contractual Language, And Erecting Duplicative Remedial Tiers

A fundamental shortcoming of the Board's *Interboro* doctrine, in the final analysis, is that it undermines private grievance arbitration as the means of resolving labor disputes and achieving industrial stability.

²² The Taft-Hartley Amendments to the Act in 1947, 61 Stat. 136, and the Landrum-Griffin Amendments in 1959, 73 Stat. 541, provide additional evidence of this legislative intent. Taft-Hartley made three significant amendments: First, it added Section 502, 29 U.S.C. § 143, which speaks of "an individual employee" and "an employee or employees" rather than using the plural form as in Section 7. Second, it added a secondary boycott prohibition in Section 8(b)(4), 29 U.S.C. § 158(b)(4), making it an unfair labor practice for a labor organization "to engage in, or induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment * * *" (emphasis added). Third, it modified Section 7 by adding "other" before the words "concerted activities," deleting a comma after "concerted activities," and adding the clause at the end of the section providing the right to refrain from Section 7 activities.

In *NLRB v. Rice Milling Co.*, 341 U.S. 665 (1951), this Court held that Section 8(b)(4), as phrased, did not reach certain secondary conduct because the refusal was not "concerted," i.e., the union's action was not "aimed at concerted, as distinguished from individual, conduct by such employees" (emphasis added). 341 U.S. at 671.

In reaction to *Rice Milling*, Congress in the Landrum-Griffin Amendments modified Section 8(b)(4) by deleting the word "concerted" and changing the terms throughout from plural to singular. Congress did not at the same time modify the Act's other use of the word "concerted" in Section 7. See S. Rep. No. 187, 86th Cong., 1st Sess. (1959), reprinted in [1959] U.S. Code Cong. & Ad. News 2318, 2384.

Under the Board's formulation, the *Interboro* doctrine comes into play whenever an employee reacts, by word or conduct, to a situation which could involve a contract violation. The doctrine then presupposes, however, that the parties' contractually agreed upon method for resolving alleged contract violations will be incapable of furnishing a remedy. As a consequence, the Board undertakes to remedy the perceived contract violation, utilizes its comparatively slow and costly processes, substitutes its own standards and interpretations, and interjects itself into private contractual matters in ways not intended by Congress or sanctioned by this Court. In so doing, it undercuts the integrity of the contracting parties' own procedures, actually sanctions or encourages individual work stoppages, and creates an unnecessary addition to an existing multiplicity of remedial structures.

1. There can be no question in the present era that firmly embedded in our national labor policy is the principle that, where a grievance arbitration mechanism is available, its utilization is the favored method for resolving contract based disputes. Section 203(d) of the Act, 29 U.S.C. § 173(d), provides in relevant part:

Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

The Court cautioned in *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960), that this "policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." See also *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 581 (1960) ("the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government"); *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 376-380 (1974) (the policy favoring grievance

arbitration is equally "applicable to labor disputes touching on the safety of the employees").

In the 1947 Taft-Hartley Amendments Congress established a judicial contract remedy through Section 301 of the Act, 29 U.S.C. § 185, in lieu of a legislative proposal to make breach of a collective bargaining agreement itself an unfair labor practice remediable by the Board. See H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41-42 (1947). Rejecting that proposal, the House Conference Report explicitly stated that "[o]nce parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." *Id.* at 42. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 452 (1957). Although this Court has recognized the Board's power, in limited circumstances, to construe a collective bargaining agreement as an incident to deciding the merits of an unfair labor practice charge, see *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967), the Court has at the same time admonished that the Board is *not* to involve itself in the determination of contractual rights under an agreement. *Id.* at 428. This is especially so where grievance arbitration has been selected by the parties as the means "for composing contractual differences." *Id.* at 426. As will be seen, the Board's *Interboro* doctrine exceeds the narrow role left to it by Congress and the Court, and ultimately does violence to the policy favoring private grievance arbitration.

2. The collective bargaining agreement under which Brown worked in the instant case contained a broad grievance arbitration clause (J.A. 61-63):

[Article VIII, Section 1.] It is mutually agreed that all grievances, disputes or complaints between the Company and the Union, or any employee or employees, arising under the terms of this Agreement shall be settled in accordance with the procedure herein provided and that there shall at no time be any strikes, lock-outs, tie-ups of equipment, slow-

downs, walk-outs or any other cessation of work except as specifically agreed to in other superseding section of this Contract (J.A. 61).

Article VIII, Section 2 (J.A. 61-62) set forth a multi-step grievance procedure culminating in "final and binding" arbitration. Article XI, Section 2 of the agreement, the no-strike clause, explicitly provided for the summary discharge of employees who "disregard the arbitration and grievance procedure" (J.A. 64). However, the vehicle safety provision of the agreement interposed a qualification:

[Article XXI, Section 1.] The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with the safety appliances prescribed by law. It shall not be a violation of this Agreement where employees refuse to operate such equipment unless such refusal is *unjustified* (J.A. 64) (emphasis added).

Thus, conforming to national labor policy, Respondent and its employees' representative agreed to an exclusive contractual mechanism for resolving job-related disputes. They also agreed to precisely worded provisions covering employee work stoppages and the type of ostensible safety dispute at issue here. There can be no question that Brown's refusal of Respondent's directive to drive truck No. 244 was a dispute cognizable under these provisions of the collective bargaining agreement, and that the parties intended such disputes to be resolved within the contractual grievance arbitration procedure.²³ The

²³ Of course, a union's decision not to pursue a grievance to arbitration, for any of various reasons, see *Vaca v. Sipes*, 386 U.S. 171, 191-192 (1967), does nothing to detract from the fact that grievance arbitration is the bargained-for and proper procedure. Inasmuch as Brown did not bring either an unfair labor practice charge under Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A), or an action under Section 301 of the Act, 29 U.S.C. § 185, the propriety of the union's decision in Brown's case, as well as the propriety of Respondent's actions under the contract, may be presumed.

Board intervened in the dispute, however, by means of its *Interboro* doctrine.

3. It must be underscored that the Board's *Interboro* doctrine does more than involve the Board in interpreting contractual language. Under the doctrine the Board instead substitutes its own standard for the contractual standard, and tests the facts against this new standard, paying only lip service to the collective bargaining agreement. The agreement in this case called for an analysis of whether the employee's refusal to drive a truck was "unjustified"—an objective test common in trucking industry contracts. The Board substituted its own standard, analyzing whether Brown's refusal was based on an honest and reasonable belief that the truck was unsafe—a test clearly involving subjective factors.²⁴ Thus, in *American Freight System, Inc.*, 264 N.L.R.B. No. 18, 111 L.R.R.M. 1385 (1982), a case factually similar to Brown's and involving the identical *contractual* test, the Board acknowledged that it was applying a "less demanding" standard and proceeded to reject an arbitration award finding an employee's refusal to drive a truck "unjustified." 111 L.R.R.M. at 1386. If the Board does violence to labor doctrine and Congressional policy by interpreting and enforcing collective bargaining agreements, it follows that the Board does even greater violence by altogether abrogating collectively bargained contract language.

Carried to its logical conclusion, the Board's *Interboro* doctrine furnishes a basis for involving it in virtually every aspect of routine day-to-day contract administration (or, more properly, mis-administration). An em-

²⁴ The Board acknowledges (Brief at 24, n.12) confusion in its decisions over whether its test is a subjective or objective one. Suffice it to say that the failure of an employee to meet the Board's test, however stated, is exceedingly rare in Board decisions. Regardless of how the Board's test is characterized, it surely is not the contractual test.

ployee who walks off the job because he believes he should have received more or less overtime work, a different job assignment, or simply more money in his paycheck, and who is discharged for walking off the job, would, under the Board's theory, be able successfully to charge the employer under the Act even though it committed no violation of the contract. The Board thus erects a second tier of "contract related" remedies which may well be totally inconsistent with what the contract provides or what the contractually designated arbitrator has determined. See, e.g., *American Freight System, Inc.*, *supra*; *Roadway Express, Inc.*, 257 N.L.R.B. 1197 1203 (1981), *enforcement denied*, 700 F.2d 687 (11th Cir. 1983) (working rule regarding vehicle write-ups); *Albertson's Inc.*, 252 N.L.R.B. 529, 535-536 (1980), *enforcement denied*, 108 L.R.R.M. 2714, 3152 (9th Cir. 1981) (breaktime, timecard, and related policies). At this juncture the contracting parties are denied their expectation of having their decision-maker construe the contract in light of the rules, practices, and precedents of the shop. See *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 582 (1960); *W. R. Grace & Co. v. Rubber Workers*, 51 U.S.L.W. 4643, 4645 (May 31, 1983). Such duplicative and inconsistent processes and remedies plainly undermine national labor policy favoring collective bargaining and dispute resolution through private grievance arbitration.²⁵

4. Apart from these policy considerations, the Board's *Interboro* doctrine also raises intense practical problems.

²⁵ One labor commentator recently observed that "the greatest threat to the integrity of the grievance arbitration process continues to come not from the courts * * *, but from the National Labor Relations Board. * * * The Board has always had an exaggerated opinion of its role and wisdom in dealing with problems of collective bargaining and contract administration." Address of Professor Donald H. Wollett delivered August 1, 1983 to American Bar Association Section of Labor and Employment Law, *reprinted in Daily Labor Report*, No. 151, D-1 at D-4 (August 4, 1983).

Parties to a collective bargaining agreement seek, by their agreement, to achieve stability in the workplace. The Board's *Interboro* doctrine impairs this objective by effectively giving employees permission to cease the performance of their work—rather than “obey and grieve” within the contractual mechanism—without relying upon any provision of the contract, without being correct as to a contractual basis, without informing the employer of a contractual basis, and, indeed, without the employer even comprehending or suspecting a contractual basis. The Board's only requirements for the application of its doctrine are (1) that the employee's conduct turn out (in retrospect) to have had some basis (with or without merit) in the contract, and (2) that the employee's conduct be honest and reasonable or, as sometimes stated, be in good faith. While the Board describes this situation as one “tailored carefully” (Brief at 23), it manifestly is not. It infuses employer-employee relations with a substantial measure of unpredictability and instability. The Board suggests (Brief at 28-30) that it provides safeguards by rendering activity unprotected if it is abusive or in violation of a no-strike clause. But these conditions are rarely found satisfied and are wholly inadequate to temper the immediate on-the-job problems and disruptions created by the Board's doctrine.²⁶

5. Finally, the Board states (Brief at 30) that a refusal to perform assigned work on safety grounds is a

²⁶ A no-strike clause frequently does not lend predictability to the result, but rather shifts the inquiry to whether the clause specifically proscribed the conduct or whether the waiver of the right to strike was “clear,” “unmistakable,” and “explicitly stated.” See *Metropolitan Edison Company v. NLRB*, 51 U.S.L.W. 4350, 4354 (April 4, 1983). In this case Brown presumably violated the no-strike clause. Certainly the Board does not mean to suggest that if Respondent had discharged Brown specifically for violating the no-strike clause, rather than for the reason stated, this case would be in a different posture. See, e.g., *American Freight System, Inc.*, *supra*; *Maryland Shipbuilding and Dry Dock Co.*, 256 N.L.R.B. 410, 413 n.13 (1981), *enforcement denied*, 683 F.2d 109 (4th Cir. 1982).

"special case." See also Brief of Amicus Teamsters For A Democratic Union. This Court need not be concerned, however, that the important issue of employee safety would not be addressed but for the Board's application of its *Interboro* doctrine. Employee safety is already the subject of substantial contractual and statutory protection. As a mandatory subject of collective bargaining, see, e.g., *NLRB v. Gulf Power Co.*, 384 F.2d 822 (5th Cir. 1967), employee safety provisions can and typically do become part of a collective bargaining agreement (as in this case). In addition to such contractual protections, employees are accorded statutory protection by Section 502 of the Act, 29 U.S.C. § 143, which states:

nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

See *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 386-387 (1974) ("ascertainable, objective evidence" of abnormally dangerous conditions required to support a work stoppage).²⁷ Further, under regulations issued by the Department of Labor, 29 C.F.R. § 1977.12, pursuant to the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*, employees are assured the right to refuse to work under dangerous conditions without adverse action by their employer. See *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 10-11 (1980). The Court accordingly need not have an abstract concern that Brown, and others who similarly refuse to perform assigned work for

²⁷ In Section 502 of the Act, 29 U.S.C. § 143, Congress established a standard or threshold governing safety related work stoppages which balances the employer's interest in getting the job done against an employee's interest in avoiding unsafe work. By applying a far less stringent standard in cases like this one, i.e., whether the employee merely had an honest and reasonable belief that the work was unsafe, the Board has nullified Congressional policy and essentially written Section 502 out of the Act.

claimed safety reasons, stand naked without a remedy. They are amply shielded by numerous layers of contractual and statutory protection.²⁸

The Board's *Interboro* doctrine cannot be justified simply on a "special case" basis. The issue before this Court must be resolved exclusively on an interpretation of the meaning of the phrase "concerted activities" in Section 7. Those words and their meaning do not and cannot change chameleon-like depending on the nature of the underlying dispute. If individual employee conduct such as Brown's is not concerted when he walks off the job due to the size of his paycheck, it plainly cannot become concerted simply because he walks off the job due to an individual safety concern.

²⁸ Yet another layer of protection is afforded to certain employees in the transportation industry by Section 405(b) of the Surface Transportation Assistance Act, 49 U.S.C. § 2305(b), which provides in pertinent part:

No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment * * *.

In framing these employee protections in Section 405(b), however, Congress expressed a policy judgment by adding specific threshold requirements for its application, which Brown plainly would not have satisfied in this case:

* * * The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer and have been unable to obtain, correction of the unsafe condition.

CONCLUSION

The case before this Court presents a clear example of the Board's effort in recent years to expand the coverage of Section 7 well beyond any meaning permitted by its language or contemplated by its drafters. Without doubt the Board's interpretation effectively deletes the word "concerted" from Section 7. As has been shown, the construction sought to be placed upon Section 7 by the Board in this case, and its asserted justifications for it, do not withstand scrutiny, have been rejected by the Courts of Appeals, and find no support in the Act's legislative history. Ultimately, the Board's doctrine undermines a fundamental policy of the Act—the resolution of labor disputes through grievance arbitration—and improperly interjects the Board directly into private contractual matters. The role the Board seeks for itself is redundant and inconsistent with remedies provided for in collective bargaining agreements and a variety of other statutes.

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CITY DISPOSAL SYSTEMS, INC.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-960

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CITY DISPOSAL SYSTEMS, INC.

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT*

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

1. Respondent erroneously contends (Br. 13-14) that the deference normally accorded the Board's construction of terms in the statute it administers is inapplicable to any construction that involves an essentially "jurisdictional" question or that concerns the "coverage of the Act." This Court has never suggested any such exception to the ordinary standard of review; instead, it has consistently upheld the Board's construction of any statutory term whenever the Board's reading of the statute is reasonable. For example, in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975), this Court, noting that the Board's holding respecting an employee's request for the assistance of a union representative at certain types of investigatory interviews represented "a permissible construction" of the phrase "'concerted activities' for * * * mutual aid or protection," held that that construction "by the agency charged by Congress with enforcement of the Act * * * should have been sustained." The Board's construction in that case extended the protection of the statute to circumstances that had, in

earlier years, been regarded as outside the coverage of the National Labor Relations Act. Nevertheless, this Court observed (420 U.S. at 266-267) that it was the special province of the Board to construe the statute in light of "changing patterns of industrial life," and it made clear that the Board's construction was subject only to "limited judicial review" (*id.* at 267, quoting *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 96 (1957)). See also *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298, 303 (1977) (upholding Board's construction and application of the statutory term "agricultural laborers," where it represented "a reasonable interpretation of the statute," even though the issue was "jurisdictional").

In the present case, the Board—for more than 20 years—has consistently construed the term "concerted activities" as encompassing an employee's reasonable and honest attempt to claim a right secured in a collective bargaining agreement. For the reasons set forth in our opening brief, the Board's construction is a reasonable one, and is therefore entitled to acceptance by this Court.

2. Contrary to respondent's contention (Resp. Br. 14-15), the Board has not conceded that its construction of the term "concerted activities" is in any way contrary to the plain meaning of the statute. To the contrary, we expressly stated in our opening brief (NLRB Br. 17) that there is "no proper basis for rejecting the Board's *Interboro* doctrine on any plain meaning theory."

We did acknowledge that the *Interboro* doctrine concerns action taken by an individual employee, but, as respondent and the Chamber of Commerce as *amicus curiae* both concede (Resp. Br. 16-17; Chamber Br. 27), no court of appeals, not even those that have rejected the *Interboro* doctrine, has accepted the notion that action taken by an individual employee cannot ever constitute "concerted" activity within the meaning of Section 7 (29 U.S.C. 157).¹ The issue is simply where to draw the line with regard to what

¹ Indeed, respondent's concession that an individual employee's conduct can properly be concerted activity within the meaning of Section 7 undermines completely its later contention (Br. 31-34) that Congress's stylistic choice of the plural "employees" in Section 7 was somehow intended as a significant limitation on the statute's coverage.

individual employee conduct is "concerted"—a problem the Board is particularly well suited to solve. The Board has reasonably concluded that "concerted" activity may embrace an individual's effort to claim a right secured from the employer by employees acting for common purposes through collective bargaining.

Respondent argues (Br. 19-20) that the Board's interpretation is unreasonable because it "creates an obvious redundancy in the statute by treating as 'concerted' any individual activity which meets the requirements of the 'purpose' clauses" of Section 7. But the *Interboro* doctrine involves both means and ends—the employee involved acts *for* the group in attempting to induce the employer to adhere to the collective agreement and also *uses* the strength of the group in seeking to take advantage of a right won through collective bargaining. Indeed, the means and ends in this case are the same as in those cases where a grievance procedure is initiated by a single employee, and respondent concedes (Resp. Br. 23) that filing a grievance with an employer is covered by Section 7.

Finally, respondent begs the question when it asserts (Resp. Br. 15) that "in a comparable context" this Court construed the term "concerted" in a prior version of Section 8(b) in a manner inconsistent with the Board's construction of "concerted" in Section 7 under the *Interboro* doctrine. See *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 671 (1951). In *Rice Milling* the question was whether a labor union's appeals to the individual employees of a neutral employer not to cross the union's recognitional picket line and pick up commodities produced by the primary employer violated Section 8(b)(4) of the Act, 29 U.S.C. (Supp. I 1946 ed.) 158(b)(4).² The Court concluded that the union's

² Section 8(b)(4) as it then existed provided in pertinent part that it would be an unfair labor practice for a labor organization or its agents "to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to * * * perform any services," where the labor organization or agent acted to accomplish any one of four prohibited objects. The term "concerted" was eliminated from Section 8(b)(4) by the 1959

separate appeals to individual employees were not aimed at eliciting "concerted" conduct, within the meaning of that provision of the Act. No collective bargaining agreement was involved in that case. Thus, respondent's assertion that the case is "comparable" to this one merely reflects respondent's disagreement with the Board's view that an employee's effort to claim rights secured in a collective agreement constitutes "concerted" conduct, as opposed to mere individual complaining.³

3. Respondent and amici contend (Resp. Br. 2-3, 23-25; Chamber Br. 4, 7-11; Roadway Express Br. 8-9) that, conceding that the actual filing of a contract grievance by an individual employee is "concerted" activity within the meaning of Section 7, the Board's application of the *Interboro* doctrine in this case is unreasonable because the employee did not file a grievance; he merely committed an act of "insubordination" by refusing to work. To answer this contention, we must disentangle two separate issues that are interwoven into the argument.

amendments to the Act. See *NLRB v. Servette, Inc.*, 377 U.S. 46, 51-52 (1964).

³ As we explained in our opening brief (NLRB Br. 24 n.13), the question in this case concerns only employee claims rooted in a collective bargaining agreement; the case does not raise the broader question whether, even absent a collective bargaining agreement, an employee complaint raising a matter of common concern may be regarded as "concerted" activity. Thus, the efforts of respondent and the Chamber of Commerce (Resp. Br. 20; Chamber Br. 18-19) to draw that broader question into issue and their citation of cases involving that question (e.g., *Air Surrey Corp.*, 229 N.L.R.B. 1064 (1977), enforcement denied, 601 F.2d 256 (6th Cir. 1979); *Alleluia Cushion Co.*, 221 N.L.R.B. 99 (1975); *Indiana Gear Works*, 156 N.L.R.B. 397 (1965), enforcement denied, 371 F.2d 273 (7th Cir. 1967)) are misplaced.

In addition, in contending (Resp. Br. 21 & n.15) that the Second, Seventh, and Eighth Circuits are among the circuits that have rejected the Board's definition of "concerted activities," respondent relies on three cases that not only do *not* involve circumstances implicating the *Interboro* doctrine, but also expressly state that they were in no way rejecting the validity of the basic doctrine. See *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 845 (2d Cir. 1980); *NLRB v. Dawson Cabinet Co.*, 566 F.2d 1079, 1084 (8th Cir. 1977) (Lay, J., concurring); *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23, 28 & n.10 (7th Cir. 1980).

First, there is the question whether the filing of a formal contract grievance is a prerequisite to finding "concerted" activity on the part of an employee seeking to claim a contract right. Second, there is the question whether a refusal to work may properly be characterized as mere insubordination when the contract right that the employee is attempting to assert is a right under the contract to refuse to do certain work. The answer to these questions is "no."

a. Several courts of appeals have implicitly held that an employee may claim a contract right without actually filing a formal grievance under the contract. Thus, in the original *Interboro* case, the employees concerned—and in particular, John Collins, the most persistent complainant—registered complaints about working conditions in a number of different ways. Collins made some complaints to the Union's business agent; others he made directly to the Company's supervisors or to the Company president himself. *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, 1296-1298 (1966), enforcement granted, 388 F.2d 495 (2d Cir. 1967). In making one of the complaints—a claim that he should not have to work separately from his brother—Collins contended that under the contract the welding assignment he had been given was a two-man job, and he refused to do it unless his brother was assigned with him. 157 N.L.R.B. at 1296. In concluding that Collins was engaged in "concerted" activity, the Board (*id.* at 1298) did not differentiate complaints made through the union's business agent from complaints made directly to company officials. Rather, it simply observed (*ibid.*; emphasis added) that "complaints made for [the purpose of enforcing the collective bargaining agreement] are grievances within the framework of the contract that affect the rights of all employees in the unit and thus constitute concerted activity which is protected by Section 7 of the Act." In enforcing the Board's order, the Second Circuit similarly did not differentiate among Collins' various complaints and it approved the view that "activities involving attempts to enforce the provisions of a collective bargaining agreement may be deemed to be for concerted purposes even in the absence of such interest by fellow employees." 388 F.2d at 500. There is no suggestion that only

the formal filing of a written grievance can be regarded as concerted activity.

Similarly, in *NLRB v. Ben Pekin Corp.*, 452 F.2d 205 (7th Cir. 1971), the employee in question had complained both to the employer directly and to a union agent about alleged violations of contractual wage provisions, and he was discharged by the employer for "'words and actions' demonstrating that 'you were not entirely satisfied with your new pay scale'" (*id.* at 206). In finding that the employee had been discharged for engaging in concerted activity within the meaning of Section 7, the court of appeals did not refer to the filing of formal grievances; it referred to "activities involving attempts to enforce the provisions of a collective bargaining agreement" (452 F.2d at 206, quoting *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 500 (2d Cir. 1967)).⁴

Moreover, precedent aside, there is no logical reason to require a formal grievance before an employee's attempt to enforce his collective rights can be protected under Section 7. The filing of a grievance—at least in the first steps of a grievance procedure—may differ very little from a simple complaint to an employer. In the present case, for example, the first step of the grievance procedure involved a conference between "the aggrieved employee, the shop steward, or both, and the foreman of [the employee's] department" (J.A. 62; emphasis added). Employee Brown, in essence, presented his complaint to the two supervisors with authority over the drivers; he told both Supervisor Jasmund and Supervisor Madary that the truck he was assigned to drive was unsafe and that he would refuse to drive it for that reason.

In addition, in this case Brown had no reason to file a formal grievance at the time he first asserted his contractual right. After he complained to the supervisors, neither of them contradicted his assertion about the truck or told him

⁴ While, as respondent notes (Resp. Br. 21), the Eighth Circuit, in *NLRB v. Selwyn Shoe Manufacturing Corp.*, 428 F.2d 217 (1970), did advert to the submission of a grievance, the court nowhere indicated that its finding of concerted activity was dependent on that fact. See *NLRB v. Dawson Cabinet Co.*, 566 F.2d at 1084 (Lay, J., concurring).

that he would be disciplined for refusing to drive.⁵ The occasion for taking further action through the grievance procedure did not arise until Brown was informed, later that day, that respondent was discharging him for asserting his right to refuse to drive the truck. Brown then filed a formal grievance under the contract (Pet. App. 14a-15a). In these circumstances, the Board was reasonable in concluding that Brown, in refusing to drive the truck to which he was assigned, was asserting a contract right.⁶

b. Respondent and amici repeatedly (Resp. Br. 23-27, 40; Chamber Br. 4-15; Roadway Br. 8-10) characterize Brown's action as mere "insubordination" that violated the established principle of obey-and-grieve, and assert that Brown was thus properly subject to swift disciplinary action by respondent. Although, in some circumstances, a work refusal may constitute an unprotected repudiation of a contractual agreement to grieve rather than strike, the "insubordination" contention raises an issue that is not properly presented in this case and that is, in any event, without merit on the record here.

As we noted in our opening brief (NLRB Br. 7 n.4, 29 n.16) and as respondent concedes (Resp. Br. 6-7), respondent's exceptions to the Board challenged only (1) the validity of the *Interboro* doctrine as a matter of law and (2) the

⁵ The administrative law judge credited Brown's version of his conversation with Supervisor Madary, the last supervisor to whom Brown spoke before leaving (Pet. App. 14a & n.7; J.A. 12, 17). Brown testified (J.A. 12) that Madary responded to his refusal for safety reasons to drive Truck No. 244 by stating that respondent would not be able to get all the garbage hauled "[i]f we go around trying to solve all the problems with the trucks we have," and finally by protesting to Brown that he didn't "want to hear [about safety considerations]."

⁶ The court of appeals did not rest its decision on any rejection of the Board's factual findings; it simply rejected the Board's legal conclusion, which rested on the *Interboro* doctrine. Therefore respondent's attempt to suggest, by recounting evidence either discredited or otherwise not relied on by the Board (Resp. Br. 3-5), that Brown refused to drive the truck for reasons other than a reasonable, good faith belief that it was unsafe raises a factual issue that respondent concedes (Resp. Br. 8-9) was not considered or decided by the court of appeals and that would remain for decision by that court upon remand.

administrative law judge's factual finding that Brown's work refusal was not predicated on some other complaint having no basis in the collective bargaining agreement.⁷ Thus, the question whether Brown forfeited the protection of Section 7 by the manner in which he made his claim, was not before the court below and is not properly presented in this Court. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-666 (1982). To put the issue into perspective, it bears repeating that the theory on which respondent prevailed in the court below does not turn on whether an employee asserts his claim by complaining orally to the employer and is discharged for making the complaint, or whether he asserts his claim by refusing to do the work in dispute and is discharged for that refusal (see NLRB Br. 27-28). The only issue in this case is whether an individual employee's reasonable, good faith assertion of a contract right is "concerted" activity within the meaning of Section 7 of the Act.⁸

⁷ Although respondent's brief in support of its exceptions adverted to the fact that "Brown simply walked off the job" (Brief to Board at 12), respondent made no effort to distinguish any issue separate from the question whether the action was "concerted."

⁸ *Yellow Freight System, Inc.*, 247 N.L.R.B. 177 (1980), cited by amicus Chamber of Commerce (Chamber Br. 9-10), indicates the distinction between "concerted" and "protected" and makes clear that nothing in the *Interboro* doctrine precludes a finding that an employee, although engaging in concerted activity by making a reasonable, good faith contract-based claim, has forfeited the protection of the Act because of the manner in which he has made his claim. In *Yellow Freight*, the Board first held (247 N.L.R.B. at 180-181) that the employee's action did not come within the *Interboro* doctrine because his protest "was not a reasonably based contract claim." Second, as an additional ground the Board held (*id.* at 181) that, even if the first point were resolved in the General Counsel's favor, the complaint must be dismissed because "the manner in which [the employee] made such an assertion rendered his conduct unprotected."

Amicus Roadway Express also indicates the distinctness of the two issues when it asserts (Roadway Br. 20-21) that, "[i]n refusal to work situations, it is irrelevant that a driver may be accompanied by a helper on the truck he refuses to drive, or that he files a grievance with his union, or even that he refuses to work on instructions from his union." However, these considerations, although irrelevant to the question whether the protection of the Act has been forfeited because the pro-

In any event, given the nature of the contract right Brown was claiming, the Board was not required to find that his refusal to drive the truck was unprotected. Brown's claim was not merely that he had a right to be assigned only to trucks that are in safe operating condition—his contract granted him a right, when justified by safety considerations, to refuse to drive a truck without being found in "violation of this Agreement" (J.A. 64, Article XXI, Section 1). As amicus Roadway Express implicitly concedes (Roadway Br. 25-26), such a provision is a contractual counterpart to federal laws removing the effect of no-strike clause sanctions under certain circumstances. It is, in short, an exception to the obey-and-grieve principle, negotiated, no doubt, because the interest in not being forced to risk one's life and health with unsafe equipment cannot easily be vindicated by after-the-fact grievance resolutions upholding the right to refuse to take that risk.⁹

4. Finally, there is no merit to the contentions of respondent and amici (Resp. Br. 34-39; Chamber Br. 14-15, 21-22; Roadway Br. 10-16, 25-26) that the Board's decision in this case improperly substitutes the standards of the Board for the contractual standard that would be applied by an arbitrator and thereby contravenes the statutory policy favoring arbitration of disputes.

It is at least arguable that the "justified refusal" standard in the contract is, as a practical matter, equivalent to the Board's requirement under *Interboro* that the claim constitute a reasonable, good faith assertion of a contract right. Compare *Chemical Leaman Tank Lines, Inc.*, 251

test violated the no-strike clause, were considered relevant by the court below in its holding that Brown's action was not "concerted" (Pet. App. 3a-5a). For the reasons set forth above, that holding was error.

⁹ Contrary to respondent's contention (Resp. Br. 40-41), the observation in our opening brief (NLRB Br. 30) that refusals to perform work on safety grounds represent a "special case" did not refer to any Board rule that a contract-based safety protest should be treated differently from other types of contract-based employee protests for purposes of determining whether the protest is concerted activity under the *Interboro* doctrine. Rather, we simply observed that the nature of the safety interest often may lead unions to negotiate exceptions to the no-strike clause like the contractual provision involved here.

N.L.R.B. 1058, 1058 (1980) (Member Truesdale, noting similarity of statutory and contractual issues) with *American Freight System, Inc.*, 264 N.L.R.B. No. 18, 111 L.R.R.M. 1385, 1386 (1982), petition for review pending, No. 82-2243 (D.C. Cir. argued Sept. 30, 1983) (Board declined to defer to grievance committee decision because it appeared that grievance concerning discharge might have been denied on grounds that equipment was subsequently shown to be safe in fact rather than on grounds that employee was acting unreasonably on basis of what was known at the time of his work refusal.) But even if the Board's good faith standard gives the employee a slight extra margin for error, it is not inconsistent with the purposes of Section 7 to do so, at least where, as here, the "justified" work refusal clause (J.A. 64), read together with the no-strike clause (J.A. 63-64), does not clearly and unmistakably restrict the right to quit work in protest over unsafe conditions to situations in which the conditions are shown to be unsafe in fact. See *Metropolitan Edison Co. v. NLRB*, No. 81-1664 (Apr. 4, 1983), slip op. 14 (waiver of statutory right "must be clear and unmistakable").¹⁰

If employees must fear discharge for the assertion of even good faith claims to contract rights, then they may well be reluctant to try to claim these rights in circumstances in which they are undeniably entitled to assert the claim. Rights won through the employees' collective strength in bargaining with the employer are of little use if employees are fearful ever to assert them. *Banyard v. NLRB*, 505 F.2d 342, 350 (D.C. Cir. 1974) (MacKinnon, J., concurring). And, as we have noted (p. 9, *supra*), contract rights such as the one involved here have little practical significance unless they can be asserted at the only time that counts—the point at which the employee is ordered to

¹⁰ As amicus Roadway Express points out (Roadway Br. 25-26), the contractual standard is a "much more flexible standard" than the one applicable in cases involving the protection of federal statutes specifically relating to safety, such as Section 502 of the Labor Management Relations Act, 29 U.S.C. 143, or Section 11(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c).

take the action that he asserts, reasonably and in good faith, he is entitled to refuse to take.

CONCLUSION

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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BRIEF FOR THE
AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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**BRIEF FOR THE
AMERICAN FEDERATION OF LABOR AND
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AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER**

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") submits this brief *amicus curiae* with the consent of the parties pursuant to this Court's rules.

INTEREST OF THE *AMICUS CURIAE*

The AFL-CIO is a federation of 99 national and international unions with a total membership of approximately 14 million working men and women. Virtually all of these

workers are covered by collective bargaining agreements between their union and their employer. The question presented here—whether “an individual employee’s honest and reasonable assertion of a right that is provided for in a collective bargaining agreement is concerted activity protected by Section 7 of the National Labor Relations Act” (Pet. for Cert. at i)—is thus of moment to virtually every AFL-CIO union member.

INTRODUCTION AND SUMMARY OF ARGUMENT

The fundamental question posed in this case is to what extent the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (“the NLRA” or “the Act”) protects an effort by a worker to attempt to enforce the provisions of a collectively-bargained agreement. This question can arise if an individual is discharged for protesting an alleged breach of the agreement through the grievance procedure; for making an “informal” complaint to the employer over the employer’s asserted noncompliance with the agreement; or, as in the instant case, for refusing to do that which the employee believes in good faith the agreement states the worker cannot be required to do. In each case, the threshold question is whether the individual has engaged in “concerted activities for the purpose of collective bargaining or other mutual aid or protection” within the meaning of § 7 of the Act.

As the court below recognized, the National Labor Relations Board (“NLRB” or “the Board”) has long held that “an individual enforcing rights under the labor contract is engaged in concerted activity . . . since the labor contract itself is the product of concerted activity and the action of the employee is an extension of that process,” 683 F.2d 1005, 1007. This is commonly referred to as the “*Interboro* doctrine” because it first received judicial approval in *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (2nd Cir.), *enfg* 157 N.L.R.B. 1295 (1966). See also *Bunney Brothers Construction Co.*, 139 N.L.R.B.

1516, 1519 (1962). The court below rejected the *Interboro* doctrine, holding that in order for an assertion of rights under a collective agreement to constitute "concerted activit[y]" it "must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action * * *." 683 F.2d at 1007 quoting *Aro, Inc. v. NLRB*, 596 F.2d 713, 718 (6th Cir. 1979). We show herein that the court below erred in so holding.

The term "concerted activity" is not self-defining, and the legislative history of the NLRA does not reveal that Congress focused on its precise meaning. Accordingly, the question of statutory construction presented by this case must be decided in light of "the provisions of the whole law, and . . . its object and policy," *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270, 285 (1956). Section 1 of the NLRA declares it to be the policy of the United States to eliminate obstructions to commerce "by encouraging the practice and procedure of collective bargaining." The Board's *Interborough* doctrine furthers that policy and accurately reflects the realities of labor relations when the rights of the parties are governed by a collective agreement.

"The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group." *J.I. Case Co. v. Labor Board*, 321 U.S. 332, 338 (1944). Thus, when an individual employee asserts that "his" rights under the collective agreement have been violated, the employee actually is asserting a *collective* right—a right that "reflect[s] the strength and bargaining power . . . of the group"; a right that the individual enjoys only because he happens to be a member of a group that secured the right; and a right he shares in common with the group. The resolution of the individual's claim will necessarily determine the rights of all

members of the group because all members hold the same rights under the collective agreement. See, e.g., *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 656 (1965); *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 700 (1966). Furthermore, since the Act seeks to further not only the negotiation of collective agreements but also the private resolution of disputes under those agreements, it would make no sense to hold that employees are protected by § 7 in negotiating a collective agreement but that they forfeit all protections in attempting to assert claims. As this Court reaffirmed in *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975), a prior case involving the scope of "concerted activity" under § 7, "the Board has the 'special function of applying the general provisions of the Act to the complexities of industrial life.'" *Id.* at 266, quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). It was error for the Court of Appeals to impose its own interpretation of § 7, since the Board's conclusion is consistent with the "object and policy" of the Act, and indeed any contrary conclusion would frustrate the Congressional design.

The foregoing analysis applies regardless of whether an employee seeks to enforce provisions of the collective agreement through a grievance, an "informal" protest, or, as here, through self-help, i.e., by refusing to do that which the employee in good faith believes the agreement states he cannot be required to do. Regardless of the means chosen by the employee, he is in all events asserting a collective right and is associating himself with the other employees' concerted assertion of right—an assertion that takes the form of a collectively negotiated agreement rather than a collective show of force.

To be sure, there are important differences between an employee's voicing a complaint and an employee's refusing to comply with an employer's directive. But the dif-

ferences between the two categories of cases relate *not* to whether the activity is concerted, but rather to the countervailing interests of the employer that are implicated. Those interests are relevant in determining whether the activity is *protected*, a question that arises only after it is decided that the activity was concerted. That distinct issue is not presented by the instant case, since before the Board respondent asserted only that the activity was not concerted and did not argue that it was unprotected. See § 10(e) of the Act; *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-666 (1982).

ARGUMENT

A. Section 7 of the NLRA grants employees a number of specifically delimited rights: "the right to self-organization, to form, join or assist labor organizations, [and] to bargain collectively through representatives of their own choosing." In addition, § 7 grants employees one right which is stated in more general terms: the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." This case concerns the scope of the latter right, for § 8(a) (1) of the Act declares it to be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in § 7."¹

¹ Because the Board, in its analysis in this case and in the line of cases on which the instant decision is based, asked whether the employee whose discharge was challenged under § 8(a) (1) was fired because he had engaged in concerted activity under § 7, we pose the issue here in like terms. At the outset, however, it is important to note that an employer may violate § 8(a) (1) without actually penalizing an employee for engaging in protected activity; conduct by the employer which *inhibits* the exercise of § 7 rights is likewise unlawful under § 8(a) (1). See *Labor Board v. Burnup & Sims*, 379 U.S. 21, 23-24 (1964); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-19 (1969); *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964); *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946). Thus even if an employee, in asserting a right under a collective agreement were not actually engaged in "concerted activity," a dis-

At the poles, determining what is and what is not "concerted activity" poses little difficulty. Thus, for example, if all workers at a place of business together present a petition to the employer they are engaged in "concerted activity"; if an individual alone seeks to negotiate an individual employment contract governing only his own employment he is not so engaged. As always, however, difficult problems are posed by cases between the extremes—for example, by a case in which an individual employee prepares a petition that he intends to submit to his fellows or an individual employee attempts to negotiate a contract for his fellows.

From the bare language of § 7, it is not self-evident where Congress intended to draw the line in extending protection only to "concerted activity." Nor is there anything in the legislative history of § 7 which, in terms, sets forth the understanding of the Congress that enacted the Wagner Act as to the meaning that Congress attached to the phrase "concerted activity."² Thus, here, as is often

charge on account of the assertion of such a right might still violate § 8(a) (1) if the discharge were found to have an inhibiting effect on the exercise of § 7 rights.

Of course, "§ 7 does not protect all concerted activities." *Labor Board v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962). Concluding that particular activity is "concerted" under § 7 therefore does not necessarily establish that the activity is protected. See pp. 15-16, *infra*.

² The "concerted activity" clause of § 7 was taken verbatim from § 2 of the Norris-LaGuardia Act, 29 U.S.C. § 102, the section of that Act which declared "the public policy of the United States." See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 n.14 (1978). Congress first borrowed that clause in enacting § 7(a) of the National Industrial Recovery Act, 48 Stat. 198. As originally introduced by Senator Wagner, the NIRA provided that codes of fair competition should recognize the right of workers "to organize and bargain collectively through representatives of their own choosing" but did not contain any additional protection for "other concerted activities." During the hearings on the bill, William Green, President of the American Federation of Labor, proposed adding such language, noting that it was "a verbatim statement from the declared policy of the Govern-

true under the Act, interpreting the statutory language requires an inquiry into "the provisions of the whole law and . . . its object and policy." *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270, 285 (1956). The language "must be construed in light of the fact that it is only one of many interwoven sections in a complex Act, mindful of the manifest purpose of the Congress to fashion a coherent national labor policy." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 179-80 (1967).

There is no doubt as to the "object and policy" of the Wagner Act. Section 1 of that Act made the policy of the Act explicit:

It is hereby declared to be the policy of the United States to eliminate the cause of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate those obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining* . . .

Accordingly, as this Court has recognized, § 7 rights "are, for the most part, collective rights, rights to act in concert with one's fellow employees; they are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining.'" *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50, 62 (1975), quoting § 1.

This understanding provides an important gloss on the words of § 7. In extending a right to engage in "con-

ment as set forth in the Norris-LaGuardia anti-injunction law." *Hearings on H.R. 5664 Before the House Comm. on Ways and Means* at 117, 73rd Cong. 1st Sess. (1933). Green's suggestion was adopted without controversy by the House Committee, and ultimately by the Congress as a whole.

The Wagner Act legislative history in turn acknowledges the Norris-LaGuardia Act and the NIRA as the antecedents of § 7, but does not offer any explanation of the key phrase. See, e.g., S. Rep. No. 573, 74th Cong., 1st Sess., at 9 (1933). The Taft-Hartley Act made no change in this language.

certed activities" § 7 plainly does not protect actions of an individual employee which are intended to establish or enforce an individual employment contract with the employer. Indeed, the very point of the national labor policy is that it "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *Emporium, supra*, at 63, quoting *Allis-Chalmers, supra*, 388 U.S. at 180. But actions which look towards, or are part of, "the practice and procedure of collective bargaining" are precisely the type of actions the Act is designed to foster. Thus these actions are within § 7's reach.

B. 1. The Labor Board's *Interboro* doctrine is faithful to this policy. That doctrine rests on a very simple proposition, one that the Board articulated four years before *Interboro* in a case on which *Interboro* relied: "the implementation of [a collective bargaining] agreement by an employee is but an extension of the concerted activity giving rise to that agreement," *Bunney Brothers Construction Co.*, 139 N.L.R.B. 1516, 1519 (1962). This proposition in turn reflects the realities of labor relations under the NLRA.³

When workers join together, form a labor union, and engage in collective bargaining, they fundamentally

³ In recent years, the Board has extended the *Interboro* doctrine by holding that an individual who invokes a statutory right or who makes a complaint not grounded in a collective agreement is nonetheless engaged in a "concerted activit[y]" if the matter he raises is of consequence to others. *E.g., Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975). A number of appellate courts, while endorsing *Interboro*, have disapproved of this extension of the *Interboro* doctrine. *See, e.g., Ontario Knife Co. v. NLRB*, 637 F.2d 840 (2nd Cir. 1980); *NLRB v. Town & Country LP Gas Service Co.*, 687 F.2d 187, 191 (7th Cir. 1982); *NLRB v. C&I Air Conditioning Inc.*, 486 F.2d 977 (9th Cir. 1973). Because the validity of this extension of *Interboro* is not raised by the instant case, we do not consider it herein.

transform the nature of the employment relationship from an individual to a collective one. "The very purpose of providing by statute for the collective agreement is to supersede the terms of the separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group." *J. I. Case Co. v. Labor Board*, 321 U.S. 332, 338 (1944). A collective agreement does not secure rights to any individual as such: "no one has a job by reason of [a collective agreement] and no obligation to any individual ordinarily comes into existence from it alone." *Id.* at 335. But any person whom the employer happens to hire into the unit covered by the agreement "becomes entitled . . . somewhat as a third party beneficiary to all benefits of the collective trade agreement." *Id.* at 336. "Its benefits and advantages are open to every employee of the represented unit." *Id.* at 338.

Thus, when an individual employee alleges that "his" rights under the collective agreement have been violated, the employee actually is asserting a *collective* right—a right that "reflect[s] the strength and bargaining power . . . of the group"; a right that the individual enjoys only because he happens to be a member of a group that secured the right; and a right he shares in common with the group. The resolution of the individual's claim will necessarily determine the rights of all members of the group because all members hold the same rights under the collective agreement. Thus, the individual's claim is, in effect, a claim of the group. "Individual claims which lie at the heart of the grievance and arbitration machinery are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based." *Smith v. Evening*

News Ass'n, 371 U.S. 195, 200 (1962). See also *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 700 (1967).

Because claims under collective agreements are claims of a collective right, the means for resolving such claims is through collective (i.e., concerted) action. Specifically, collective agreements typically contain a grievance-arbitration procedure which provides the exclusive means for resolving any dispute under the agreement. See *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). In the grievance procedure, the employer faces his employees as a group. The group—the union—decides whether to settle or prosecute a particular grievance, see *Vaca v. Sipes*, 386 U.S. 171 (1967), and “as in the collective bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit.” *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.9 (1974). Indeed, “the grievance-arbitration procedure forms an integral part of the collective bargaining process,” *Metropolitan Edison Co. v. NLRB*, — U.S. —, 51 U.S.L.W. 4350, 4354 (April 4, 1983), a process that is “continuing”, *Conley v. Gibson*, 355 U.S. 41, 46 (1957).⁴

⁴ The Court said in *Conley*:

Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. [355 U.S. at 46.]

The very point of *Conley* (which arose under the Railway Labor Act) and of like cases under the NLRA is that because the power to control enforcement of the collective agreement through the grievance procedure is fixed (unless the agreement otherwise provides) exclusively in the bargaining representative, the union owes a duty of fair representation to the employee in handling the grievance. See, e.g., *Vaca v. Sipes*, *supra*; *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

The interrelationship between an individual complaint under a collective agreement and the continuing process of collective bargaining is most obvious when the individual presents his claim in such a manner as to satisfy the first step in the grievance procedure and thereby formally triggers that procedure. But there is seldom a bright line to separate "grievances" from "complaints." Under the typical agreement, any dispute as to the meaning or application of a collective agreement can be processed through the grievance machinery. And many collective bargaining agreements provide that the first step in the grievance procedure is for the affected employee to meet with his supervisor to attempt to resolve the dispute;⁶ thus, what may to an outsider appear to be only an employee's gripe, will often be an effort, however inartful, to initiate the grievance process.

In any event, as a practical matter, for a rank-and-file employee "unsophisticated in collective bargaining matters," cf. *DelCostello v. Teamsters*, No. 81-2386 (U.S., June 8, 1983) slip op. p. 11, a complaint to "the boss" is often the predicate to the submission of a formal grievance. Moreover, to limit § 7 protection to those complaints that are presented in such a manner as to legally qualify as part of the grievance procedure would transform such procedures into technical rules of pleading—rules that would trap many an unwary rank-and-file worker. "Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." Cf. *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972). Thus in *Interboro* the Board wisely concluded that all contract complaints should be viewed as "grievances within the framework of the contract" for purposes of § 7. 157 N.L.R.B. at 1298.

⁶ See, e.g., *Republic Steel Co. v. Maddox*, 379 U.S. 650, 658 (1965).

In sum, when an individual alleges a violation of a right secured by a collective agreement, the individual is attempting to vindicate a right that was secured by the group, that belongs to the group, and that is enforced through the group. Thus, in concluding that the assertion of a claim under a collective agreement is not an island of individual activity but rather is part of the whole continent of concerted activity in which the employees, through their union, are continuously engaged, the Board was merely "adopt[ing] the Act to changing patterns of industrial life." *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). This, of course, is precisely the "responsibility" that is "entrusted to the Board." *Id.*

2. Indeed, had the Board reached any other conclusion it would have flouted the "object and policy" (p. 7, *supra*) of the NLRA. That Act, after all, seeks to further both the negotiation of collective agreements and the private resolution of disputes under those agreements.* NLRA, § 8(d); LMRA, § 203(d). It would be ironic, indeed, if employees were held to be protected by § 7 in negotiating a collective agreement and a mechanism for resolving disputes under that agreement, but were not protected in asserting claims under that agreement or in attempting, however clumsily, to submit disputes to the grievance machinery. Such a holding would disparage the grievance procedure and ultimately the collective bargaining process itself. Thus, the *Interboro* doctrine, by viewing the presentation of claims under a collective agreement as an extension of the concerted activities involved in creating the agreement, advances the objectives of the NLRA.

* The Act disfavors the making of individual employment contracts, see *J.I. Case, supra*, 321 U.S. at 338, and thus an individual employee's efforts to secure such an individual agreement or to enforce rights thereunder are not, ordinarily, "concerted" activities.

3. The court below nonetheless concluded that the *Interboro* doctrine is foreclosed by "the plain language of Section 7." 683 F.2d at 1007. The court stated:

Section 7 requires that the employee engage in 'concerted activities.' An individual does not act in concert with himself. [*Id.*]

This reasoning misses the entire point of the Act.

What the Board concluded in *Interboro* is that in making a claim under a collective agreement the individual's action is not disassociated from the concerted activity of collective bargaining. *Interboro* thus rests on the Board's determination that a close nexus exists between the individual complaint and the ongoing concerted activity of negotiating, administering and enforcing the collective agreement. And nothing in the "plain language" of § 7 precludes a finding of "concerted activity" based on such a nexus. Indeed, the lower court itself concluded that a claim submitted by a single individual can constitute "concerted activity" if "made with the object of inducing or preparing for group action." 683 F.2d at 1007.

In sum, *Interboro* accords with the realities of industrial relations and the policies of the Act. It is, therefore, at the very least a "defensible" construction of the statute and, as such, is "entitled to considerable deference." *NLRB v. Iron Workers*, 434 U.S. 335, 350 (1971). This Court has recognized that the task of "delineat[ing] precisely the boundaries of the '[concerted activities . . . for] mutual aid or protection clause' . . . is for the Board to perform in the first instance as it considers the wide variety of cases that come before it." *Eastex, Inc. v. NLRB*, *supra*, 437 U.S. at 568. See also *Weingarten*, *supra*, 420 U.S. at 266-67.

C. 1. We have focused thus far on the application of *Interboro* in its traditional context, i.e., to the assertion of a claim under a collective agreement. In this case, of course, the discharged employee, James Brown, did more than merely allege a breach of the collective agreement.

Brown refused to drive a particular truck to which he was assigned on the ground that the truck had defective brakes and had been so reported by a fellow employee. In refusing to drive, Brown was exercising a right—indeed, two rights—stated in the collective bargaining agreement.⁷ Accordingly, under the principles previously discussed, his activity was *concerted* whether or not his refusal was *protected*, which, as noted at p. 6, n.1, *supra*, is a distinct issue.

It appears from the collective agreement that respondent's employees had concertedly decided not to drive unsafe trucks, and to support each other in refusing to do so. Instead of reenacting their concerted determination not to drive an unsafe truck each time an employee was directed to do so, the employees collectively negotiated for all members of the group the contractual right to refuse to do so. That agreement, in effect, is a proxy for concerted shows of force: each time an employee refuses

⁷ Article XXI, § 1 of the Agreement, provided:

The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with the safety appliances prescribed by law. It shall not be a violation of the Agreement where employees refuse to operate such equipment unless such refusal is unjustified.

The Administrative Law Judge expressly found that Brown's "complaint . . . regarding truck 244's brakes was warranted" in light of the fact that the employee had observed the brakes malfunction two days earlier (Pet. App. 19a).

In addition to § 1, Article XXI § 4, provided:

The Employer shall not ask or require any employee to take out equipment that has been reported by any other employee as being in an unsafe operating condition until same has been approved as being safe by the mechanical department.

As the ALJ found, truck 244 had been reported to be unsafe by another employee two days earlier and there is no evidence that during the ensuing weekend the truck was approved as safe by the mechanical department; thus, it appears that Brown had a right to refuse to drive the truck under this latter section as well.

to drive an unsafe truck, he clothes himself in the concerted determination of the group, and the group is behind the employee. And Brown's refusal to work is an assertion of that right, which belongs to each member of the group as such.⁸ At a minimum, Brown's refusal to drive Truck 244 was "an individual employee's honest and reasonable assertion of a right that is provided in a collective bargaining agreement." Pet. for Cert. at i. It would be contrary to the policies and objectives of the Act to require an employee to instigate a showing of group support in order to meet § 7's concertedness requirement.⁹

In short, there is no analytically sound distinction between cases involving protests over the alleged breach of a collectively-bargained right and cases involving the good-faith exercise of such a right. The Board, therefore, has properly applied its *Interboro* doctrine to the latter category of cases.

2. To be sure, there are obvious common-sense differences between an employee's articulating a complaint and an employee's noncompliance with an employer's command. Those differences relate to the countervailing interests of the employer that are implicated, and *not* to whether the activity is concerted. They therefore bear on whether the activity is *protected*, but are not pertinent to the threshold issue whether the activity is *concerted*.

A work stoppage is unprotected if it is in breach of the collective agreement, see, e.g., *Mastro Plastics Corp.*,

⁸ Of course, the fact that Brown's discharge may have violated the agreement did not deprive him of a remedy under the NLRA. See *NLRB v. Strong*, 393 U.S. 357, 360 (1969) and cases cited *id.*

⁹ If the discharged employee and the employee who was regularly assigned to drive truck 244 had both refused to drive the truck in its then-existing condition—or, if all employees had refused to work in support of Brown—plainly their activities would have been "concerted."

supra, 350 U.S. at 280, n.10, unless the breach is excused, see, e.g., *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 385 (1974) (discussing § 502 of the Labor Management Relations Act of 1947, 29 U.S.C. § 143). In the present case, this Court need not and should not consider whether the employee's refusal to drive truck 244 was protected, because the employer made no contention before the Board that the employee's refusal was unprotected. Accordingly, the employer is barred by § 10(e) of the Act from obtaining judicial review of the Board's decision on that ground, as this Court recently reiterated in *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-666 (1982).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

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**In the
Supreme Court of the United States**

OCTOBER TERM 1982

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CITY DISPOSAL SYSTEMS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

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**In the
Supreme Court of the United States**

OCTOBER TERM 1982

No. 82-960

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CITY DISPOSAL SYSTEMS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

**BRIEF OF AMICUS CURIAE
THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA**

This brief *amicus curiae* is filed with the written consent of the parties. The letters giving consent have been separately filed with the Court.

I. INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is a federation consisting of more than 4,000 state and local chambers of commerce and trade and professional associations as well as more than 231,000 business firms and individuals who maintain direct membership. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member employers in important labor relations matters before the courts, the United States Congress, the Executive Branch, and the independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance its members' interests in a wide spectrum of labor relations litigation.

The Chamber views this case as one of genuine significance to the business community. The holding of the NLRB in this case, if allowed to stand, throws a cloak of immunity from industrial discipline around acts of individual employee insubordination. The Board would require such breaches of plant discipline to be condoned by employers if the employee merely claims subjective reliance on a provision in a union contract. The Chamber's view is that such a rule goes far beyond the intent of the framers of the Act. It is also the Chamber's view that this unwarranted interference by the Board into matters of plant discipline is a threat to orderly production and, as a result, necessarily will adversely affect productivity. The reach of this decision is therefore of concern to virtually all members of the Chamber of Commerce and, indeed, to every citizen, since all of us have a stake in the need for improvement in American industry's productivity.

II. THE ISSUE WHICH CAUSED THIS AMICUS BRIEF TO BE FILED

The issue may, we believe, fairly be stated as follows:

Whether an individual employee who refuses to perform a work assignment is engaged in "concerted" activity within the meaning of Section 7 of the National Labor Relations Act any time he believes that the assignment contravenes some provision of the applicable collective bargaining agreement.

III. SUMMARY OF FACTS AND PROCEEDINGS

There seems no need in this *amicus* brief for a detailed statement of facts. While there are some differences between the parties as to some aspects of the facts, there seems to be no dispute as to the essentials.

Brown, a driver for a garbage company, refused an assignment to drive a truck, stating that the truck had a brake problem. The conversation with a supervisor at the time became somewhat heated, with Brown saying to one of the supervisors, "Bob, what are you going to do, put the garbage ahead of the safety of the men?" Brown left work, and the Company then allegedly constructively discharged him by notifying him that he had "quit."

A provision in the governing collective bargaining agreement gave each bargaining unit employee the right, under specified circumstances defined in the agreement, to refuse to operate unsafe equipment. Brown filed a grievance alleging a right under that contractual clause to have refused to operate the truck. The grievance was processed through the initial steps of the contractual grievance procedure, but was dropped by the Union short of arbitration as having no merit.

The employee then filed a charge with the NLRB, claiming that his refusal of the driving assignment constituted engaging in "protected concerted activity," and that his discharge was in violation of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1). The General Counsel issued a complaint so alleging. An Administrative Law Judge found that a Section 8(a)(1) violation had occurred, and the Board affirmed. The Court of Appeals for the Sixth Circuit reversed, finding insubstantial evidence of concerted activity and stating that the Court was "in complete agreement" with Judge Edwards' analysis in a strikingly similar case in the D.C. Circuit. *Kohls v. NLRB*, 629 F.2d 173, 177 (D.C. Cir. 1980).

The Board sought *certiorari*, and this Court granted *certiorari* on March 28, 1983 (J.A. 69).

IV. SUMMARY OF ARGUMENT

It is the Chamber's position that individual insubordination does not constitute protected concerted activity for the purpose of mutual aid or protection within the meaning of Section 7 of the Act.

As this Court pointed out some thirty years ago in *Labor Board v. Electrical Workers, IBEW*, 346 U.S. 464, 475 (1953):

Many cases reaching their final disposition in the Courts of Appeals furnish examples emphasizing the importance of *enforcing industrial plant discipline* and of maintaining loyalty . . . *as well as the rights of concerted activities*. The courts have refused to reinstate employees discharged for "cause" consisting of *insubordination, disobedience* or *disloyalty* . . .

The legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough (emphasis added).

It has been widely recognized by labor arbitrators, by the Board, and by the courts that even where a work order may be in some way violative of the collective agreement, the employee to whom it is directed must nevertheless obey the work order and only thereafter may he or she challenge its propriety through established grievance procedures.

Federal safety laws have established certain criteria for determining when an employee may refuse unsafe work assignments. Many collective agreements, like the one here, also define when an employee has the right to refuse to operate unsafe equipment. Arbitrators have interpreted collective bargaining agreements, either with or without such specific exculpatory provisions, as not requiring an employee to jeopardize his life in order to hold his job. No expansive interpretation of the NLRA's Section 7, a provision regulating labor relations matters, not safety matters, is needed to protect employee rights already safeguarded by laws and contract provisions dealing specifically with employee health and safety.

Thus, safety concerns should not be permitted to skew an orderly development of the law with respect to concerted activity, or give added meaning to the old saw that hard cases make bad law. The true issue here is whether the statute can be construed, as the Board has done, to throw Section 7's protective net around an individual employee's refusal to comply with a work order solely because the employee honestly believes (though he does not even assert) that the work order contravenes the terms of a collective bargaining agreement.

This case has some semblance to, but also some significant differences from, cases holding that the making of certain kinds of employee complaints (whether made by one or several individuals) is protected concerted activity.

Whether an individual complaint can constitute protected concerted activity is difficult to answer in the abstract. We will trace, in this brief, some of the development of that doctrine. It is the Chamber's view that the so-called *Interboro* doctrine is sound only to the extent that it is interpreted to limit employer action which threatens the integrity of collectively bargained grievance procedures. The Board has extended it, in this case and others, far beyond that, without legal justification.

In any event, the *Interboro* doctrine, whatever its appropriate scope, should surely not be extended to apply to this case or others of its genre. An employee who commits the individual act of disobeying a work order on the strength of a subjective (and here apparently erroneous) belief that the order contravenes some term of the collective agreement is *not* engaging in protected concerted activity. The orderly functioning of production processes requires that employers be able to count on each employee to perform his or her assigned tasks. That principle has been recognized on the shop floor and implemented in judicial, administrative, and arbitral forums. Neither the language of the Act nor its underlying purposes require or permit that significant concept to be undermined by a legal fiction that individual insubordination is somehow "protected concerted activity." That is why the decision of the Board in this case must be reversed.

V. ARGUMENT

A. Section 7 of the Act Does Not Protect Individual Acts of In- subordination

1. The Law of the Shop Requires that Employees "Obey- Now, Grieve-Later"

(a) The Principle

Certain shop practices have become so widely accepted and regularly recognized in so many decisional forums that they may fairly be said to constitute institutionalized industrial law. This is true of the principle that an employee in the United States, when given a work order, is obliged to carry it out, even if he believes it to be contractually or legally improper; and only after he has done so may he seek corrective or remedial action through established administrative procedures or collectively bargained grievance procedures. This principle has come to be known by the shorthand appellation "obey-now, grieve-later."

(b) Origins of the Rule

The principle probably originated in the decisions of labor arbitrators, not an uncommon source of the law of the shop in American industry. Prasow and Petus in *Arbitration and Collective Bargaining* (1970) offer the following instructive comment at page 42:

On few questions do arbitrators display as much unanimity in upholding management's right to manage as they do in the area of work assignments. An

employee must obey orders, carry out assignments, and grieve afterward. He must not take matters into his own hands, resort to "self-help" by by-passing the grievance procedure. Even if the employee is subsequently found to be right and his grievance ruled meritorious, arbitrators will uphold harsh penalties by management for his failure to obey orders and grieve later.

See also Elkouri & Elkouri, How Arbitration Works (3d Ed. 1976) 154-159.

The rationale for the rule was succinctly stated by one of the first great labor arbitrators, the late Dean Shulman, in an early volume of published arbitration awards, *Ford Motor Co.*, 3 LA 779, 780-781 (1944):

Some men apparently think that, when a violation of a contract seems clear, the employee may refuse to obey and thus resort to self-help rather than the grievance procedure. That is an erroneous point of view. In the first place, what appears to one party to be a clear violation may not seem so at all to the other party. Neither party can be the final judge as to whether the contract has been violated. The determination of that issue rests in collective negotiation through the grievance procedure . . .

But an industrial plant is not a debating society. Its object is production. When a controversy arises, production cannot wait for exhaustion of the grievance procedure. While that procedure is being pursued, production must go on. And someone must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in supervision.

Thus, the principle has been embedded in the literature of industrial dispute resolution for over four decades.

(c) Judicial Acceptance of the Principle

Courts have come to recognize this principle as one of general application. Thus, in *Lewis v. Greyhound Lines-East*, 555 F.2d 1053, 1055, n.4, (D.C.Cir. 1977), the court observed, apparently as a matter of established law:

In other words, it is not the legitimate prerogative of the employee to disobey a supervisory order, even if he believes that his contractual rights are violated. . . . If he deemed that [company] action improper, he should have pursued his remedy through the established grievance procedure.

Similarly, in *Reynolds v. Washington Tug & Barge Co.*, 91 L.C. ¶12,825, (n.6), (W.D.Wash. 1980), it was said:

. . . an employer's action in response to his employee's failure to work now—grieve later are typically upheld regardless if the employee is subsequently found to be correct and his grievance meritorious.

See also *Pfefferkorn v. Borden, Inc.*, 106 LRRM 2036, 2038 (N.D.Ind. 1980).

(d) The NLRB Has Recognized the Principle But Has Embarked on an Ambivalent and Confusing Course

The National Labor Relations Board has also recognized and applied this principle. In *Yellow Freight System, Inc.*, 247 NLRB 177 (1980), the Board affirmed the ruling of an Administrative Law Judge who had found an employee not to have engaged in protected concerted activity when he refused to complete the last leg of his driving assignment on the ground that he could not contractually be required to drive for over ten hours. The Law Judge said:

Even assuming that it could be found that Novak asserted a reasonably based contractual right, I find that his conduct was not protected because it constituted insubordination. By protesting the job assignment and delaying the continuation of his run in the face of driving-time restrictions, Novak was in effect attempting to work only on his own terms. His conduct was therefore unprotected. See, *John S. Swift Co., Inc.*, 124 NLRB 394, 397 (1959); *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946).

Id. at 181. See also *National Radio Co.*, 205 NLRB 1179 (1973) where the Board deferred, under *Spielberg Manufacturing Co.*, 112 NLRB 1080, to the decision of long-time arbitrator Archibald Cox, who had upheld the discharge of a union representative who refused to obey a reporting procedure he believed to be improper " 'instead of utilizing his plain and adequate remedy under the grievance procedure for questioning the validity of the reporting requirement.' " *Id.*, at 1179.¹

Similarly, in *American Ship Building Co.*, 226 NLRB 788 (1976), the Board sustained the discharge of an employee who refused to unload a truck, saying:

If Krieg believed that as union president he was not required by contract and practice to perform rigger's work, the procedure which he should have followed

¹ Cf. *Michigan Screw Products*, 242 NLRB 811 (1979), 813-14, cited in the Board's brief, pp. 24, 30, where the Board approved an ALJ's refusal to follow the obey-now grieve-later principle to a situation where an employee had failed to accept an overtime "call-in," but only because the employer had never advised the employee that the acceptance of call-in overtime was mandatory. When employees are aware that overtime assignments are mandatory, the Board has sustained, as properly based on insubordination, discharges of employees who refuse overtime assignments. *Scott Paper Box Company*, 81 NLRB 535, 548 (1949).

was to obey Van Horn's order and then process a grievance through the grievance procedure of the collective bargaining contract.

Id. 789.

The Board's recognition of the principle is thus unmistakable. Yet in some other cases decided both before and after the above cited cases, which we will detail later in this brief, the Board has taken what seems quite an opposite tack, finding that an insubordinate refusal to carry out an order *is* protected concerted activity when motivated by the employee's belief that the work order was improper under the collective agreement or under some state or federal law or for virtually any reason which the Board finds "of common concern" to employees. The courts of appeal have rarely granted enforcement to the Board's orders in such cases.

2. To Protect Individual Acts of Insubordination Would Be Directly Contrary to the Intent of Section 7

Not only is individual insubordination unprotected by the Act, but it is a confrontational act completely inconsistent with the basic scheme of the Act and, indeed, with the essential intent of Section 7. The reason for granting Section 7 rights to employees is to further the fundamental belief of the NLRA's founders that industrial disputes can and should be peacefully resolved through orderly, collective discussion rather than by chaotic confrontations.

The Act's purpose clause sets forth the aim of:

... removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions . . .

In Title II of the 1947 Act, it was again reaffirmed that:

It is the policy of the United States that—

- (a) Sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of the employer and the employees can more satisfactorily be secured by the settlement of issues between employers and employees through the processes of conferences and collective bargaining between employers and the representatives of their employees; . . .

29 U.S.C. §171(a).

This emphasis on resolution of disputes through collective consultation, as embodied in the National Labor Relations Act, represented some shift in direction from earlier laws which had merely unleashed both individual and collective acts of self-help and had left employers and employees free to do unregulated battle.

The Clayton Act had freed up certain forms of employee protest from the sanctions of the antitrust laws, "whether singly or in concert" (Sections 6 and 20 of the Clayton Act, 15 U.S.C. §17, 29 U.S.C. §52). The Norris-LaGuardia Act had freed from the injunctive powers of the federal courts acts of protest and economic confrontation by employees "whether singly or in concert." 29 U.S.C. §104.

The regulatory scheme of the National Labor Relations Act differs from the Clayton and Norris-LaGuardia Acts' untying the hands of individual employees and their unions. The change in emphasis was noted by this Court in *Boys Market v. Clerks Union*, 398 U.S. 235, 251 (1970):

As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the

encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes. (Emphasis supplied.)

Because of the Act's emphasis on collective resolution of work place disputes, individual rights under the NLRA are not only not of primary importance, but are necessarily subordinated to collective procedures. It protects individual rights:

... not for their own sake but as an instrument of the national labor policy of *minimizing industrial strife* "by encouraging the practice and procedure of *collective bargaining*." (Emphasis supplied.)

Emporium Capwell Co. v. Community Org., 420 U.S. 50, 61 (1975). As this Court further observed in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 at 180 (1967):

The policy therefore extinguishes the individual employee's power to order his relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.

Relatively early in the administration of the Act, it became obvious that in order to achieve this purpose, it was necessary to interpret the Act in such a way as to recognize both the right of employees to engage in collective action and an employer's need for discipline. In *Republic Aviation Corp. v. Board*, 324 U.S. 793, 797-798 (1945), the Court noted:

These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon

employer or employee. *Opportunity to organize and proper discipline are both essential elements in a balanced society.* (Emphasis supplied.)

It would be wholly inconsistent with the purpose of the Act, and of Section 7 in particular, to sanctify, as the Board would here, the right of the individual to engage in a confrontational, insubordinate act. Instead, the individual employee should observe plant discipline and seek his remedy through contractual grievance and arbitration procedures.

The central role of such procedures was emphasized by this Court in the Trilogy. *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960). The primary role of such procedures in the resolution of work place disputes under a collective agreement was again emphasized in *Republic Steel v. Maddox*, 379 U.S. 650 (1965), where the Court held that an individual employee does not even have the right to resort to independent, individual litigation to enforce his contractual rights without first exhausting the contractual grievance procedures. The Court there said:

Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. LMRA §203(d), 29 U.S.C. §173(d), §201(c), 29 U.S.C. §171(c)

A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a law suit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances.

Id. at 653.

And in *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50 (1975), this Court held that small groups of employees did not have the right to resort to self-help picketing or to insist on direct dealing with the employer, rather than to follow established grievance procedures, even in the interest of protecting themselves against alleged racial discrimination.

Surely if individuals are forbidden even direct access to court procedures and if groups of individuals may be prevented from resorting to concerted, confrontational self-help because disputes are to be resolved by utilization of contractual grievance machinery, it would be anomalous indeed to permit individual employees to resort to individual, confrontational self-help.

To ignore the obey-now, grieve-later principle and, instead, to accord the Act's protection to an employee who by-passes the collective grievance machinery and registers his complaint by resorting to an individual act of insubordination is, therefore, contrary to the central purposes of the Act.

**B. It Is Not Necessary to Expand
Section 7 in Order to Grant
Appropriate Safety Protection
to an Employee Ordered to Per-
form an Unsafe Act**

The beginnings of the Board's departure from the sound obey-now, grieve-later principle arose out of cases which, like this one, had safety implications. The conclusion seems ineluctable that the Board was led down this path by sympathy with what it saw as a dilemma for the employee—should he refuse an order and risk being fired or should he obey the order and risk being hurt? The Board seemed totally unaware that the orderly way out of

that dilemma had already been provided by safety laws and regulations and by negotiated contract provisions. There was and is no need for the National Labor Relations Board to rush to the rescue by distorting Section 7 and construing as "concerted activity" a totally individual act of insubordination. The courts, perhaps accustomed to more vigorously analytical decision-making, have, in all but a few isolated cases, refused to accept the Board's tortured construction.

1. **NLRB Tolerance of Insubordination in Safety Cases, Although Not Shared by the Courts, Still Persists, Though Not with Total Consistency**

The first safety-related case in which the Board appears to have condoned insubordinate conduct was *Illinois Ruan Transport Corporation*, 165 NLRB 227 (1967). There the Board found "protected concerted activity" when an employee, allegedly out of concern for the safety of his vehicle, departed from his scheduled driving route and, acting on his own and without any authorization from his employer, arranged for an ICC inspection of his vehicle. The Board was reversed in *Illinois Ruan Transport Corporation v. NLRB*, 404 F.2d 274 (8th Cir. 1978) because the court found no "concerted activity."

In *United Parcel Service*, 241 NLRB 1074 (1979), a case strikingly similar to the instant case, the Board found an individual employee's refusal to drive a truck because of his alleged concern about the safety of the brakes to be "protected concerted activity." The court of appeals for the D.C. Circuit again found no evidence of "concerted activity" and denied enforcement of the Board's order. *Kohls v. NLRB*, 629 F.2d 173 (D.C.Cir. 1980). The opinion in that case was authored by Judge Harry Edwards, a

former distinguished labor law professor at the University of Michigan, and was relied upon by the court of appeals in the case now before this Court.

In *Roadway Express*, 257 NLRB 1197 (1981), the Board found an employee's refusal to drive a truck until after it had been inspected to be "protected concerted activity." Once again, the Court denied enforcement, holding that the individual refusal was not concerted activity. *Roadway Express v. NLRB*, F.2d, 112 LRRM 3152 (11th Cir. 1983)²

Although the Board has been quite consistently reversed by the Courts of Appeal in these safety cases, it has nevertheless persisted in a number of cases, none of which have been reviewed in the courts of appeal, finding that an employee's refusal to perform tasks which he or she believes unsafe is, somehow, protected concerted activity. *United States Stove Co.*, 241 NLRB 1402 (1979), (employee's refusal to operate a press because he believed it to be in an unsafe condition *held* protected activity "relating to a matter of common concern"); *Youngstown Sheet & Tube Co.*, 235 NLRB 572 (1978) (individual employee's refusal to perform certain operations to repair a damaged chain, claiming safety reasons, *held* protected concerted activity); *T & T Industries, Inc.*, 235 NLRB 517 (1978) (individual employee's refusal to haul a load because of alleged concern over the condition of the truck lights *held* protected concerted activity); *Varied Enterprises, Inc.*, 240 NLRB 126 (1979) (individual employee's refusal to

² The Court, although noting the availability of the contractual grievance procedure, did not specifically rely upon the "obey-now, grieve-later" doctrine—but instead, refused to approve what has come to be known as the *Interboro* doctrine, *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 500 (2d Cir. 1967). We will explore the origins, meaning, and proper reach of that doctrine later in this brief.

drive a trailer alleged to be of illegal length *held* protected concerted activity).

In none of these cases is there any discussion of the obey-now, grieve-later principle, although the Board's holding in each of them is contrary to that principle.³

2. The Board's Expanded Application of a Right of Insubordination to Non-Safety Cases Has Met with Further Court Rejection

Although receiving virtually no support from the courts of appeal for its eagerness to characterize individual insubordination in safety cases as protected concerted activity,⁴ the Board has nevertheless now expanded Section 7 to justify individual insubordination any time an

³ But see *Chemical Leaman Tank Lines*, 251 NLRB 1058 (1980) and *United Parcel Service, Inc.*, 232 NLRB 1114, *aff'd sub nom Bloom v. NLRB*, 603 F.2d 1015 (D.C.Cir. 1979) in both of which the Board deferred to arbitration awards sustaining the discharge of employees who claimed a right to refuse allegedly unsafe work assignments.

⁴ But see *Banyard v. NLRB*, 505 F.2d 342 (D.C.Cir. 1974) where the Court seems to have found that a refusal by an individual employee to perform an assignment violative of a state safety law is protected concerted activity. This case seems completely at odds with that Court's later decisions in *Bloom* and in *Kohls*, cited *supra*. These cases of individual insubordination must, of course, be distinguished from group work stoppages, which, by definition, are concerted activity. There has been support in the courts of appeals for protecting such stoppages even where the contract contains a no-strike clause, either on the ground that the contract (as some do) contains an exception permitting refusals of assignments under certain safety conditions or on the ground that Section 502(c) of the NLRA applies, which Section specifies that the quitting of labor "in good faith because of abnormally dangerous conditions of work" shall not "be deemed a strike." *Wheeling-Pittsburgh Steel v. N.L.R.B.*, 618 F.2d 1009 (3d Cir. 1979) (footnote continued)

employee believes he or she is not being properly treated under any provision of the union contract or because of any other protest which the Board is persuaded may be of "common concern" to employees. *See, e.g., Dawson Cabinet Company*, 228 NLRB 290 (1976) (female employee's refusal to perform certain work unless paid at what she alleged was the "male rate" for the job); and *Ontario Knife Company*, 247 NLRB 1288 (1980) (individual employee's refusal of work because she claimed the employer was assigning too much of a certain kind of work to the night shift employees). The courts of appeal have been equally unsympathetic with the Board's expansionary views of Section 7 and its tolerance of insubordination in these cases. *NLRB v. Dawson Cabinet Co.*, 566 F.2d 1079 (8th Cir. 1977); *Ontario Knife v. NLRB*, 637 F.2d 840 (2d Cir. 1980). *See also E. I. Dupont de Nemours & Company, Inc.*, 262 NLRB No. 126 (1982), *enf. den.*, F.2d, 113 LRRM 2931 (9th Cir. 1983).

Thus in both safety-related and non-safety-related cases, the courts of appeal have refused to enforce the Board's orders in these cases of insubordination, and have not accepted the Board's view that individual acts of insubordination can be concerted activity within the meaning of Section 7.

(footnote continued)

1980). And, of course, in the absence of a no-strike contract, a concerted work stoppage is normally protected, whether inspired by safety reasons, as in *NLRB v. Modern Carpet Industries, Inc.*, 611 F.2d 811 (10th Cir. 1979), or by reason of other kinds of employee dissatisfaction with working conditions, as in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). One court of appeals has also enforced a Board order in what appears to have been an individual act of insubordination, but on the ground that the specific facts of the case warranted finding "sufficient union involvement" to make the activity concerted. *McLean Trucking Co. v. NLRB*, 689 F.2d 605 (6th Cir. 1982).

3. **Employee Safety is Protected By Safety Laws and Contracts and Warrants No Distortion of Section 7**

There was no need for the Board to have embarked on a course of perverting the plain language of Section 7 in order to come to the aid of an employee who may be improperly ordered to perform an unsafe act. There are adequate protections for such employees both in safety legislation and in many collective agreements. As pointed out in the Board's brief (p. 31), Congress has recently enacted legislation specifically directed at precisely this type of a situation in the transportation industry. Section 405(b) of the Surface Transportation Assistance Act of 1982, Pub.L.No. 97-424, 96 Stat. 2157, prohibits the discharge or discipline of any employee:

... for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment.

Similarly, this Court has held that the Secretary of Labor acted within his authority in promulgating rules and regulations under the Occupational Safety and Health Act, 29 U.S.C. §660(c)(1), 29 C.F.R. §1977.12 (1979), which prohibit an employer from discharging or disciplining an employee who refuses to perform a work assignment because of a reasonable apprehension of death or serious injury, coupled with a reasonable belief that no less drastic alternative is available, and an inability by the employee to obtain corrective action by the employer. *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980).

Section 502(c) of the National Labor Relations Act, as amended, 29 U.S.C. §143, also makes specific that collective action, even if in breach of a no-strike clause, is permissible if the employees concertedly leave their work "because of abnormally dangerous conditions." But "ascertainable, objective evidence" of the abnormally dangerous conditions is required, and the kind of wholly subjective belief relied upon by the Board in its Section 7 safety cases is insufficient to invoke this claim. *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 386-387 (1974).

Already some courts have noted that the NLRB has applied a much looser, and essentially subjective standard, for determining whether an employee's refusal of an allegedly unsafe assignment is justifiable. Although the government in its brief here claims that the Board has required that the employee's belief be both honestly held and reasonable (Board's Brief at 24, nt. 12), the Board has not generally applied such a standard. In *Wheeling-Pittsburgh Steel v. N.L.R.B.*, 618 F.2d 1009, 1016, n. 15 (3d Cir. 1980), the Court noted:

. . . the NLRB's position that a good faith belief that working conditions are hazardous need not be reasonable so long as it is sincere.

This is far different from the standard approved by this Court in either *Whirlpool* or *Gateway*, *supra*.

Collective agreements, including the one in the instant case, also safeguard the employee's right to refuse orders to perform unsafe work, and vary in their delineation of the circumstances under which such refusals are permitted. As mentioned in the *amicus* brief of the AFL-CIO (n. 7, p. 14), the agreement here has two protective clauses, one permitting an employee to refuse to operate unsafe equipment (unless such refusal is "unjustified"), and another prohibiting an employer from requiring an employee to

take out equipment that has been reported by any other employee as being in an unsafe operating condition until the same has been approved as being safe by the mechanical department. These contractual standards, like the standards in safety laws and regulations, require something more than the Board's standard of subjective belief or a mere assertion of reliance on some contract provision. (It will be recalled that in the instant case the Union did not pursue Brown's grievance, apparently because it did not believe his refusal was justified by the contract.)

It may well impede the orderly development and clarification of those safety laws and regulations and of relevant provisions of collective agreements for the NLRB—an agency with no particular expertise in safety matters—to develop its own standards for permitting refusals of allegedly unsafe work assignments under Section 7, which does not even speak to safety issues.

But more seriously, as we have repeatedly pointed out in this brief, the danger in warping and bending Section 7 out of unneeded concern for employee safety lies in paving the way for the Board's subsequent generalized blessing of insubordinate conduct when based upon a subjective alleged belief that the work order contravenes some provision of the collective agreement. For the Board to develop case law in safety matters differing from the case law developing under specific safety statutes and collective agreements is michievous enough. But for these safety cases to serve as a springboard for a generalized protection of insubordinate conduct is not only an unwarranted and insupportable interpretation of Section 7, but it is a dangerous doctrine threatening the well-established, obey-now, grieve-later law of the shop as developed by judicial, administrative, and arbitral tribunals.

**C. Individual Actions Are Protected
by Section 7 Only if They Are in
Furtherance of Contractual Griev-
ance Procedures or if They Are
an Integral Part of Group Action**

Both the Board's brief and the excellent *amicus* brief of the AFL-CIO make much of the need to protect the integrity of collectively bargained grievance procedures. They correctly point out that this Court has specifically held that the grievance arbitration procedure of a collective agreement "forms an integral part of the collective bargaining process." *Metropolitan Edison Co. v. NLRB*, U.S., 51 U.S.L.W. 4350, 4354 (April 4, 1983); *Conley v. Gibson*, 355 U.S. 41, 46 (1957).

Both the Board and the AFL-CIO erroneously seek to use that premise to urge this Court to affirm the Board here, arguing that the Board's decision was consistent with, although perhaps an extension of, the Board's controversial *Interboro* doctrine. *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), *enf.*, *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (2nd Cir. 1967). The *dicta* in *Interboro* has been relied upon by the Board to support rulings which do not rest on a need to protect orderly grievance procedures. Indeed, the Board has relied upon it to support protecting a wide variety of individual employee complaints arising in contexts totally outside any contractual grievance machinery.

The facts of the *Interboro* case may have justified a need for protecting the contractual procedures. There the employee had made complaints to his foreman concerning alleged violations of the collective agreement. In view of the Board's holding that the making of the complaint to the foreman under the facts of that case constituted the filing of a grievance within the framework of the contract,

it is understandable that both the Board and the court recognized a need to protect the integrity of the contractual grievance machinery.

A like need has been recognized in other cases such as *NLRB v. Adams Delivery Serv., Inc.*, 623 F.2d 96, 100 (9th Cir. 1980). There the court enforced a Board order protecting the right of an employee to make a complaint to his union, which complaint had been transmitted by the union to the employer. As the Court said:

Where an employee enlists the aid of the union to enforce a contractually guaranteed employment right, the need to employ a fiction of group activity vanishes . . . Our decisions indicate a strong preference that the established grievance procedure be used to resolve employment disputes, and to hold otherwise would ignore the importance of the counseling function which the union serves in these matters.

Id. at 100.

In *Interboro*, however, the court, in *dicta*, used language which has been frequently quoted and has been subject to much controversy. The court said:

. . . activities involving attempts to enforce the provisions of a collective agreement may be deemed to be for concerted purposes even in the absence of . . . interest by fellow employees.

Id. at 500.

There has been much debate and disagreement and much discussion about whether other circuits should accept or reject this so-called *Interboro* doctrine. If one looks to the facts of these cases rather than to the arguments of the various courts about the precise meaning of that oft-quoted *Interboro dicta*, however, one finds that when the Board has sought to utilize this *dicta* to extend *Interboro* to fact situations involving employee

complaints outside the framework of a contractual grievance procedure, it has had little success in the courts.

In *N.L.R.B. v. Buddies Supermarkets, Inc.*, 481 F.2d 714 (5th Cir. 1973), the court denied enforcement of a Board order which attempted to protect an employee who was trying to get a more favorable contract for himself than the employer had made available for his fellow employees. In denying enforcement, the court noted that the employee's acts:

... did not arise in the framework of an attempt to enforce an existing collective bargaining agreement.

Id. at 719.

In *Roadway Express v. NLRB*, F.2d, 112 LRRM 3152, 3153 (1983), when an employee insisted on taking time away from his work duties to complain about a matter which had already been resolved by the grievance procedure, the court of appeals for the Eleventh Circuit denied enforcement of the Board order. An employee's attempt to *reject* a dispute resolution achieved through the contractual grievance procedure surely does not protect that procedure.

In *ARO, Inc. v. NLRB*, 596 F.2d 713 (6th Cir. 1979), the court refused to enforce a Board order protecting an individual complainant who was a temporary employee and had no contractual right of access to the established grievance machinery. The court noted:

The Board's decision and order creates, in effect, grievance rights for temporary/probationary employees, by the filing of an unfair labor practice, which do not exist under the collective bargaining agreement.

Id. at 718.

In *Mushroom Transportation Co. v. N.L.R.B.*, 330 F.2d 683, 685 (3d Cir. 1964), another court of appeals refused to enforce a Board order which sought to protect complaints

by a temporary employee who was not covered by the collective bargaining agreement.⁵

Again in *N.L.R.B. v. Northern Metal Co.*, 440 F.2d 881 (3d Cir. 1971), the same circuit denied enforcement of a probationary employee's complaint which was not subject to the contract's grievance procedure, and where the Union had clearly indicated to the employee that he did not have rights under the agreement.

In yet another case, a court refused to apply *Interboro* when there was no collective contract in effect. In *Indiana Gear Works v. N.L.R.B.*, 371 F.2d 273 (7th Cir. 1967), the court denied enforcement of a Board order which sought to protect the right of an individual employee to display cartoons ridiculing the employer's president and its latest wage increase. There was no collective bargaining agreement in effect; nor, in fact, were the employees represented by any union. Obviously, since there was no contract in effect, there was no negotiated grievance procedure in place and, therefore, no issue of protecting the integrity of such procedures.⁶

As noted in the AFL-CIO *amicus* brief (p. 8), courts have also disapproved the Board's attempted extension of its *Interboro* doctrine to protect individuals who make a complaint not grounded in a collective agreement, but complaining instead of an alleged statutory violation or

⁵ The Court's opinion in *Mushroom* states that employee activity should be regarded as concerted only if "engaged in with the object of initiating or inducing or preparing for group action." When the employee activity is something other than invoking collectively bargained grievance procedures, this seems sound.

⁶ The Court in this case approved the test for concerted activity utilized by the Third Circuit in *Mushroom Transportation Co. v. N.L.R.B.*, *supra*.

other matters of "common concern." See, e.g., *Ontario Knife v. NLRB*, 637 F.2d 840, 845 (2d Cir. 1980). Courts have been similarly unwilling to extend protection under *Interboro* to employees who do not even assert a contractual basis for their complaints. See, e.g., *NLRB v. C & I Air Conditioning, Inc.*, 486 F.2d 977, 979 (9th Cir. 1973), where the court adopted the dissenting view of one of the authors of this brief, who was then Chairman of the National Labor Relations Board.

The courts' opinions in these cases have offered a considerable variety of rationales for their results. But we suggest that the facts speak more convincingly than the legal debates. The courts will protect individual complaints which are either a proper exercise of contractual grievance rights or if the individuals are acting in concert with other employees or preparing to do so. Those results are totally consistent with the intent and purpose of Section 7.

Because it is our view that *Interboro* cannot and should not be extended to protect individual insubordination, we do not believe that this Court need here fully delineate the precise extent of *Interboro's* permissible reach. The Board, however, urges upon this Court a need to respect and affirm the so-called *Interboro* doctrine. If, as a result of the Board's contentions, the Court utilizes its opinion in this case as a vehicle for defining the proper limits of *Interboro*, we urge that Section 7 not be expanded to protect individual rights except when essential to protect the integrity of collectively bargained grievance procedures. Where there is in effect no collective agreement, or where the complaint has already been resolved in the grievance procedure, or where the individual has no right of access to grievance procedures because, for example, he is in probationary status, or because there is no contract and hence no established grievance procedure,

then we suggest that individual complaints⁷ do not come within the intended scope of Section 7. In such cases the test laid down by the circuits in such cases as *Mushroom Transportation* and *ARO* to the effect that the individual action is protected only if made with the object of inducing or preparing for group action would seem entirely appropriate.

**D. Whatever the Proper Reach of the
Interboro Doctrine, It Should Not Protect
Individual Acts of Insubordi-
nation**

Whatever the appropriate reach of Section 7 in protecting the integrity of collectively bargained grievance procedures, however, it need not and should not be extended to protect individual acts of insubordination. An act of insubordination is not, as the AFL-CIO would have it, a mere clumsy attempt to submit a dispute to the grievance procedure (AFL-CIO brief, p. 12). It is the very antithesis of the kind of orderly dispute resolution typified by grievance discussions. Insubordination by an employee is a highly individualized and confrontational act.

⁷ The AFL-CIO is correct in stating that there is not always a clearly determinable line to separate "grievances from complaints." It is also true, again as stated by the AFL-CIO in its brief, that in many grievance procedures, the first step is for the affected employee to meet with the supervisor, perhaps not even with a steward, in order to discuss the grievance. But it is no arduous task for the Board or the Court to determine whether there is in effect such a grievance procedure and to determine whether the individual was attempting to utilize it in an orderly fashion. The tests suggested by this brief should not, therefore, pose any serious interpretative difficulties.

Nor is the AFL-CIO correct in suggesting that the Court need not reach this aspect of the case because it concerns whether the activity is "protected" rather than whether it is "concerted." Brown's refusal to drive the truck, here, was a clearly individual, not a concerted, act.

Two people were not directed to drive the truck. Only one was.

Two people did not refuse to drive the truck. Only one did.

Brown's act was simply not concerted. Whatever the appropriate reach of the *Interboro* doctrine, it does not and should not extend to fictionalize as "concerted" such an act of individual insubordination.

Reversal of the Board and denial of enforcement of its order here is supportive and protective of the integrity of contractual grievance procedures. To enforce the Board's order and to validate individual acts of insubordination, rather than resort to orderly grievance processes, is destructive, not supportive, of Section 7 rights.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit should be affirmed, and the complaint herein should be dismissed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
V.

CITY DISPOSAL, INC.,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE,
THE LEGAL FOUNDATION OF AMERICA,
URGING AFFIRMANCE

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NO. 82-960

IN THE
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OCTOBER TERM, 1983

NATIONAL LABOR RELATIONS BOARD,
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V.
CITY DISPOSAL, INC.,
RESPONDENT

BRIEF OF AMICUS CURIAE,
THE LEGAL FOUNDATION OF AMERICA,
URGING AFFIRMANCE

INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in Internal Revenue regulations. It is located on the campus of the South Texas College of Law in Houston and shares personnel and activities with the law school.¹ It has expertise in the presentation of issues of economics and related public policy to the courts.

LFA has frequently appeared as amicus curiae in cases involving labor issues both in this honorable Supreme Court and in lower courts. All litigation undertaken by LFA is approved by its Board of Trustees, the majority of whom are attorneys.

1 Amicus wishes to acknowledge the assistance of law student Linda Yee Chew in the preparation of this brief.

SUMMARY OF ARGUMENT

Amicus curiae will not undertake to duplicate the detailed analysis of case law or statutory language that respondent has done, although we agree with that analysis. Instead, LFA wishes to show the Court that a requirement of actual concert is grounded in sound policy reasons. The legislative history shows that Congress intended to achieve the policies that are articulated here, and they are also to be found in the cases interpreting the in concert requirement.

First, the requirement of actual concert makes it more likely that disputes will be based upon valid, significant, and widely shared claims. The requirement causes most such claims to be better focused and articulated, since they must by definition be discussed with or involve other employees. The actual concert requirement also ensures that dissident employees will not gain unfairly at the expense of fellow employees merely because they are adamant. As a consequence, a requirement of actual concerted activity ultimately fosters labor peace. The Board's approach is inconsistent with these statutory goals.

The actual concert requirement also provides a less ambiguous definition of the Board's authority than its current approach. This better definition will result in clearer limits upon the Board's jurisdiction. It will also encourage resort to less expensive dispute resolution proceedings for individual grievances.

PRELIMINARY STATEMENT: THE STATUTORY LANGUAGE IS CLEAR

The language of the Act, requiring "concerted" action for "collective" bargaining or "mutual" aid and protection, is clear and supports affirmance. The policy analysis set forth in this brief is subordinate to the language Congress adopted.

However, the NLRB asserts that the Court of Appeals reached a result that Congress "could not have intended." NLRB Brief 26-28. Amicus seeks, here, to demonstrate that the NLRB's assertion is erroneous. There are sound reasons under-

lying an actual concert requirement, and Congress not only could have intended to address them, but did.

ARGUMENT

A REQUIREMENT OF ACTUAL CONCERTED ACTIVITY IS BASED UPON SOUND POLICY REASONS THAT ARE TO BE FOUND IN BOTH THE LEGISLATIVE HISTORY AND THE CASE LAW.

1. *The "in concert" requirement increases the probability that protected activity will advance matters of significant concern to employees generally, rather than idiosyncratic preferences.* As interpreted by the Board, the Interboro doctrine empowers a single employee to make his own idiosyncratic interpretation of the interests of workers and to further the interests he thus chooses, regardless of the opinions of others. But the Congressional debate indicates clearly that the NLRA was intended to further a more democratic process,² in which concerns that were relatively widely shared were raised and negotiated through representatives of workers acting in concert.³ The requirement

2 References to industrial "democracy" as resulting from the Act are to be found throughout the legislative history. See Gorman & Finkin, *The Individual and the Requirement of "Concert"* Under the National Labor Relations Act, 130 U. PA. L. REV. 286, 339 (1981) (hereinafter cited as Gorman). Gorman concludes (erroneously, it is submitted) that protection of "democracy" refers to protection of unilateral individual action, and this conclusion leads him in turn to argue that individual action is protected without active or "constructive" concert—a position even the Board does not endorse. "Democracy" clearly implies discussion, majoritarianism, and group action, contrary to Gorman.

3 The "democracy" was contemplated as being exercised primarily through collective bargaining and other representative mechanisms. See *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U. S. 50 (1975); *NLRB v. R. C. Cola*, 328 F.2d 974, 978-79 (5th Cir. 1964). See also National Labor Relations Act section 1 (declaration of purpose).

of actual concert makes it more likely that the disputes that consume the efforts of both labor and management will be significant and legitimate ones.

In this regard, we respectfully disagree with the NLRB's assertion that a single-employee, on-the-spot work stoppage must "necessarily" affect others positively, or that it is "likely" to "work to the benefit of all." NLRB Brief at 22-23. The bulk of the Board's cases clearly show otherwise. In many of the Board's decisions on this issue, the employee is actually trying to take rights from other employees or to give less pleasant work to his fellows, and he attempts to force adoption of his view by fiat—through a unilateral work stoppage.⁴ In other Board cases, the employee has sought to shield his own nonperformance from employer response.⁵ There is no basis for the NLRB's assertion that a decision by one employee to take action he alone deems appropriate will work to the "benefit of all," and it contravenes the fundamental assumptions of the Act.

2. *The "in concert" requirement increases the probability that the protected activity will involve a valid, true complaint, and it decreases the likelihood of pretext.* The Board's approach does not require that the single employee complaint it protects be true or valid or supported by the collective agreement. It need not even be probably valid; in fact, it need not even be possibly valid. All that the Board requires is that there be some basis from which some one among many employees *might*

4 See cases cited in note 15 *infra* and accompanying text.

5 For example, in *NLRB v. Buddies Supermarkets*, 481 F. 2d 714 (5th Cir. 1973), protracted negotiations were followed by a single employee's persistent efforts to set aside an outcome other employees deemed beneficial. The Board considered this conduct concerted; the Court of Appeals did not, and it denied enforcement. See also authorities cited in note 7 *infra*.

conclude, in his own mind, that the complaint is well founded.⁶ Since most employees can find a way of stating personal complaints in terms of purported safety concerns, comfort, working conditions, or similar arguments, the Board's approach openly encourages pretextual complaints.

The Board's decisions disclose that the giving of pretextual explanations for claimed protected activity is a real and frequent problem.⁷ The requirement of actual concert, of course, would not eliminate pretext, but if a complaint must be shared by several workers and acted upon by them together, the probability of pretext decreases.

3. *The "in concert" requirement sharpens the articulation of the dispute and focuses it.* The Board's approach to the Interboro doctrine encourages hasty and thoughtless action, in which a single employee may unilaterally decide on the spot to stop work and nevertheless frustrate any reasonable employer response. If several employees must act in actual concert, there is greater likelihood of careful formulation of the disputed issue, simply because they are likely to share the concern or discuss the action among themselves first. Furthermore, the complaint is more likely to be communicated in a manner that will lead to its peaceful resolution.

6 John Sexton & Co., 217 N. L. R. B. 80 (1975); T & T Industries, 235 N. L. R. B. 517 (1978). In these cases, the Board "threw its protective net broadly, holding that section 7 protection applies even if the employee's complaint is ultimately found to lack merit." Gorman 284. As Gorman puts it, with reference to the Interboro doctrine, "[T]he Board makes no pretense that the individual's complaint must be . . . anchored in the labor contract; it will be deemed concerted activity whether or not the . . . contract actually supports the claim. . . ."

7 E.g., *Indiana Gear Works v. NLRB*, 371 F. 2d 273, 276 (7th Cir. 1967) (employee's action motivated by personal malice toward employer, not by claimed concern for general equity in wages). As Gorman demonstrates, the board's decision was not based upon

An example of the counterproductive effect of the Board's approach is to be found in *Indiana Gear Works v. NLRB*,⁸ in which an employee publicly posted sarcastic cartoons with his own captions, cruelly and personally ridiculing the company president. He acted alone, because his fellow employees, though asked, refused to join him. He thus adopted a most counterproductive method to communicate his concern. Nevertheless, the Board ordered reinstatement (a holding consistent with its position here); the Court of Appeals—correctly, it is submitted—denied enforcement. Concerted action would have been more likely to produce a dispute better focused toward resolution.

4. *The "in concert" requirement ultimately fosters labor peace.* The single most important policy underlying the adoption of the NLRA was the goal of labor peace.⁹ The "in concert" requirement, for the reasons given above, clearly furthers this Congressional goal. The Board's approach does not; indeed, in several of its cases, the Board has regarded conduct as protected even when labor peace has resulted from protracted negotiations

neutral principles, and the reasoning could have supported acceptance of the "pretext" (wage equity) as well as it did the Court of Appeal's actual finding. *Gorman* 287; see also *Northern Motor Carriers, Inc.*, 130 N. L. R. B. 261 (1961) (malice rather than pretext of working conditions); *NLRB v. Lenkurt Elec. Co.*, 459 F. 2d 635, 638 (9th Cir. 1972) (dictum; same); *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F. 2d 304 (4th Cir. 1980) (enforcement denied) (Board finding of concert rejected on evidence showing it was pretext for "a preoccupation with filing claims for compensation" and lax safety practices).

- 8 371 F. 2d 273, 276 (7th Cir. 1967). The Board considered this individual action protected; the Court of Appeals did not, and it denied enforcement. In several other cases, the board has considered as protected such "expressions" as a single employee suddenly halting work for reasons sufficient to him or her. *Ontario Knife Co. v. NLRB*, 637 F. 2d 840 (2d Cir. 1980) (enforcement denied); *NLRB v. Dawson Cabinet Co.*, 566 F. 2d 1079 (8th Cir. 1977) (enforcement denied).

- 9 See Section 1 of the Act (statement of purpose). "All the bill does is for the sake of peace and harmony" 79 Cong. Rec. 7673, ____th Cong., ____ Sess.(1935) (remarks of Rep. Walsh).

only to be followed by a single employee's refusal to accept the negotiated outcome.¹⁰ Furthermore, the Board's approach approves the conduct of employees who unilaterally engage in sudden work refusals,¹¹ even though such "one-person wildcat strikes" would usually be in violation of collective agreements if engaged in by multiple employees in concert.¹²

The Board maintains that its approach is "tailored carefully," or closely limited, to the policies of the Act. Cf. NLRB Brief at 23-24. *Amicus curiae* would respectfully disagree. This is a grant of power to each of perhaps thousands of employees in a firm to engage in unilateral work stoppages, limited only by the need for some minimal basis for belief and by each individual's own subjective sincerity. As Judge Brown said in *NLRB v. R. C. Cola Co.*, 328 F. 2d 974, 978-79 (5th Cir. 1964):

There cannot be bargaining in any real sense if the employer has to deal with individuals or splinter groups. And just as attempted negotiation with such groups or individuals would make a mockery out of bargaining, so, too, must bargaining by single agency be kept free from divisive pressures generated by dissident elements.

The remarks of supporters of the Act in Congress lead to the same conclusion:¹³

10 E.g., *NLRB v. Buddies Supermarkets*, 481 F. 2d 714 (5th Cir. 1973) (enforcement denied).

11 See note 9 *supra*.

12 Cf. Gorman 355-56: "Most obviously, a no-strike provision . . . should have the same impact on a 'protest stoppage' by an individual . . . (A) labor agreement will in most instances render unprotected an individual's stoppage"

13 79 Cong. Rec. 7673 (May 16, 1935) (remarks of Sen. Waishe).

We are requiring employees to negotiate with the properly designated representatives of their employees in the hope of having peace, in the hope of removing misunderstanding

Congress sought to *avoid* unorganized work stoppages, not encourage them:^{13a}

National labor policy has been built on the premise that by pooling their economic strength . . . , the employees of an appropriate unit have the most effective means of bargaining The policy, therefore, extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees.

The NLRB's grant of authority to each individual employee to stop work for reasons sufficient to him alone is not "tailored carefully" to these objectives.

5. *The "in concert" requirement prevents idiosyncratic or obstreperous employees from benefitting unfairly at the expense of fellow employees.* The Board's approach does not require the employee's conduct to be consistent with fellow employees' interests for it to be protected. It can be motivated entirely by a desire to benefit ones' self at the expense of all others, so long as it "relates" in some manner to working conditions.¹⁴ This approach means that an employee attempting to obtain working conditions that he, alone, considers beneficial, and which are dis-

13a *Id.*

14 *E.g.*, *Air Surrey Corp.*, 229 N. L. R. B. 1064 (1977), enforcement denied on other grounds, 601 F. 2d 256 (6th Cir. 1979); *Cf. NLRB v. Interforo Contractors, Inc.*, 388 F. 2d 495 (2d Cir. 1967) ("It is doubtful that a selfish motive negates the protection").

advantageous to every other employee in the shop, is nonetheless protected. Indeed, many of the Board's decisions in this area involve single-employee work refusals based on disputes over seniority or similar entitlements, in which the employee is by definition attempting to benefit himself at the expense of his fellows.¹⁵ He may be able to obtain advantages in wages or working conditions merely because he is adamant, when they would be distributed differently if based on unhampered negotiation and agreement. One-employee work stoppages having such an effect are contrary to the most basic purposes of the Act.¹⁶ A requirement of actual concert would not eliminate this result completely, but at the very least it would ensure that the employee must persuade some other workers of his position or involve them before acting on it.

The NLRB argues that "selfishness" is no guarantee that an employee's action will not benefit others, and that is true; but neither is there any basis for the NLRB's tacit assumption that selfish conduct must "necessarily" help others. NLRB Brief at 21-22. If it is joined in by none of his fellows, the assumption should be otherwise; the entire basis of the Act is that matters of real, shared concern to employees as a group are likely to lead to concerted activity, and that is one reason that concerted action is what the Act protects.

6. *The "in concert" requirement helps employers to react reasonably to individual employees' poor performance or work habits.* The Board's approach ensures that, if an employee is both a poor employee and a chronic complainer, management cannot react to his poor performance without fear that a differ-

15 NLRB v. Selwyn Shoe Mfg. Corp., 428 F. 2d 217 (8th Cir. 1970) (employee's insubordination, based on assertion of seniority rights in effort to take work from another employee, held protected as constructively concerted); ARO, Inc. v. NLRB, 596 F. 2d 713 (6th Cir. 1979) (similar; enforcement denied); Ontario Knife Co. v. NLRB, 637 F. 2d 840 (2d Cir. 1980) (similar; enforcement denied).

16 See authorities cited in notes 2, 3, 10 supra.

ent interpretation of the facts will produce an unfair labor practice adjudication. Indeed, many of the Board's decisions in this area have involved efforts to distinguish poor performance, backbiting, and insubordination from conduct the Board has considered protected. These cases virtually always involve unpredictable inferences from diffuse and hotly contested facts.¹⁷

7. The "in concert" requirement increases the employer's willingness to sign a collective bargaining agreement. If he believes that disputes over meanings will be resolved in a consistent and organized manner (such as the contractual grievance mechanism), an employer may be willing to sign a collective bargaining agreement obligating him to provide rights that are valuable but difficult of definition. However, if the meaning of such rights as that to a "safe work place" is open to every employee's individual interpretation and provides a basis for protected individual work stoppages based on such idiosyncratic interpretations, no rational employer would willingly sign such an agreement. It must be remembered that the Board's approach does not require¹⁸ that the claim be probably or even possibly valid, or that it be processed through the contractual grievance mechanism. Most collective agreements are lengthy and comprehensive, and the variety of individual conduct that can be "related to" them, either legitimately or pretextually, is infinite.

In this regard, the NLRB argues that an on-the-spot work stoppage will "serve as an example" for imitation by other employees. NLRB Brief at 26. But when the main restraint upon

17 E.g., *Ryder Tank Lines, Inc.*, 135 N. L. R. B. 936, enforcement denied on other grounds, 310 F. 2d 233 (5th Cir. 1962); *R. J. Tower Iron Works*, 144 N. L. R. B. 445 (1963); see also cases cited note 7, *supra*. See generally Gorman 289-93, 354 (labelling "chronic complainer" cases "troubling" and stating that they rest on "coincidence of facts.").

18 See note 4 *supra*.

such imitation is each employee's own subjective sincerity, it may be questioned whether such an example is as desirable as the NLRB assumes.

8. *The "in concert" requirement encourages resort to inexpensive alternatives for individual dispute resolution, in preference to an NLRB proceeding.* The Interboro doctrine encourages resort in the first instance to an NLRB proceeding, which is an adversary trial, followed by all the briefing, findings, and appeals of litigation, with delay before trial and, sometimes, years before decision. In contrast, most collective agreements provide for more expeditious and inexpensive grievance resolution processes.¹⁹ The Board's current practice does not even involve deferring to such contractual procedures.²⁰ The "in-concert" requirement would not eliminate unnecessary litigation, but it would have greater tendency to confine Board proceedings to matters in which more protracted proceedings are useful.

Harvard University President Derek Bok, himself a labor law expert, has recently criticized certain areas of labor law^{20a} as "fine-spun applications of vague, even contradictory, principles with no convincing demonstration of how the public interest is served."^{20b} Even if not harmful, proceedings under such standards "do cost inordinate amounts of money, time and energy." One definitional question on labor issues, regarding an election, cost Harvard "over a year of effort and more than one hundred

19 Cf. Gorman 356-57.

20 Id.

20a Bok, A Flawed System, 85 HARV. MAGAZINE 38, 40 (1983).

20b The distinction between "personal gripes" on the one hand, and "selfish" actions germane to working conditions on the other, is such a "fine-spun application," particularly if the NLRB's differentiation of "abusive" or "opprobrious" conduct from that "related to" the collective agreement is added. See note 22 infra.

thousand dollars." Bok concludes, "Even a rich country cannot afford to spend such sums on issues of this kind." But the Board's approach causes expensive proceedings to proliferate.

9. *The "in concert" requirement honors the sound policy in favor of clear definition of jurisdiction.* The doctrine that although "personal gripes" are not protected, self-interested conduct is protected if it is germane to working conditions or to some provision in a collective agreement, is a distinction so ethereal that it enables the Board to reach almost any result in almost any case. As Gorman puts it, the Board's decisions in this area are characterized by "elusiveness and inconsistency."²¹ There is simply no clear distinction that can be made between a "personal gripe" and a "protected self-interested gripe." Sound policy dictates that the jurisdiction of an agency such as the NLRB be clearly defined. The sweep of that jurisdiction was a matter of concern to, and was carefully limited by, the Congress that passed the NLRA.²²

CONCLUSION

The "in concert" requirement serves sound policy. The Congressional debate discloses a number of goals that Congress clearly intended to advance by passage of the NLRA, and these goals in turn are advanced by a requirement of actual concert. The NLRB's constructive concert approach, as seen in the Interboro doctrine, is in conflict with the achievement of these Congressional purposes. The case at bar was correctly decided by the Court of Appeals, and its judgment should be affirmed.

21 Gorman 299; see generally *Id.* at 289-310.

22 "Nothing in the language of the Act, nor its legislative history, evidences an intent on the part of Congress . . . to intrude into the day-to-day operation of an employer's business." *ARO, Inc. v. NLRB*, 596 F. 2d 713 (6th Cir. 1979).

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In the Supreme Court of the United States

October Term, 1983

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

CITY DISPOSAL SYSTEMS, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

**BRIEF OF ROADWAY EXPRESS, INC.
AS AMICUS CURIAE**

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**BRIEF OF ROADWAY EXPRESS, INC.
AS AMICUS CURIAE**

CONSENT TO FILING

This Amicus Brief is filed, pursuant to Supreme Court Rule 36.2, with the written consent of both parties. Letters to that effect have been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

The interest of Roadway Express, Inc. in this case arises from the fact that it is a party to a case recently decided by the Eleventh Circuit Court of Appeals containing issues identical to those in the case presently before this Court. *Roadway Express, Inc. v. NLRB*, 700 F.2d 687 (11th Cir. 1983). Roadway Express, like Respondent in this case, operates a trucking business and is a signatory to the *National Master Freight Agreement*, the collective bargaining agreement between the trucking industry and

the Teamsters Union. The National Labor Relations Board has filed a petition for a Writ of Certiorari with this Court in the *Roadway Express* case, No. 82-2061, upon which it has requested this Court to withhold action pending the outcome of this case.

SUMMARY OF ARGUMENT

Since *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295 (1966), *enf'd*, 388 F.2d 495 (2d Cir. 1967), the National Labor Relations Board (the Board) has maintained that when a single employee claims a right under a collective bargaining agreement, he implicitly engages in concerted activity which is protected by Section 7 of the National Labor Relations Act. 29 U.S.C. §157 (the Act).

The Board has used *Interboro* to expand its jurisdiction to include all cases in which an employer disciplines an employee for the latter's breach of contract. This is an unwarranted extension of the Board's domain into private contractual matters, which was expressly forbidden by Congress. Grievance arbitration, as the method established by the parties for settling contractual disputes, is entirely capable of vindicating the employee wrongly disciplined by his employer. The Board, through *Interboro*, however, seeks to rewrite the collective bargaining agreement, to sidestep the arbitration process and to impose standards of conduct upon the parties quite different than those for which they bargained. The Board holds that an employee has a Section 7 right to act on his own interpretation of the collective bargaining agreement and to disregard his employer's directives, regardless of the correctness of the employee's position in terms of the contract. This interference in the contractual process deprives the employer of his right to maintain order and discipline in the workplace.

Furthermore, the *Interboro* doctrine contains critical flaws in logic. In this case, the Board applied the doctrine to an employee's refusal to work. Where, as in this case, employees have a collective bargaining agreement that contains a no-strike clause, the employees collectively may not engage in work stoppages or slowdowns not otherwise permitted by the contract. The Board's use of *Interboro* here, however, allows an individual employee to refuse to work in the name of his fellows where the group itself could not engage in such a refusal without breaching its contract.

The Board has jurisdiction over matters of employee discipline covered by contract in the case of a safety dispute only when such disputes fall under Section 502 of the Labor Management Relations Act. 29 U.S.C. §143. In order to trigger such jurisdiction, however, an employee must present the Board with *objective* evidence of a safety hazard which he claims to justify his refusal to work. Congress intended that the Board play a very limited role in safety disputes. Several other safeguards exist to protect the employee from hazardous working conditions, but they are not within the Board's domain.

ARGUMENT

I.

The Board Exceeds Its Jurisdiction by Injecting Itself Into Private Disputes Arising Under a Collective Bargaining Agreement.

Following its decision in *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), *enf'd*, 388 F.2d 495 (2d Cir. 1967), the Board repeatedly has found that any colorable assertion by an employee of a contract right, *whether legitimate under the contract or not*, is protected activity under the Act. As the Board in *John W. Sexton & Co.*, 217 N.L.R.B. 80 (1975), pointed out, it

has consistently held that Section 7 of the Act protects employees['] attempts . . . to implement the terms of bargaining agreements *irrespective of whether* the asserted contract claims are ultimately found *meritorious*

Id. (emphasis supplied). *Accord*, *T&T Industries, Inc.*, 235 N.L.R.B. 517, 520 (1978). In this way, the Board is able to find that an employer can commit unfair labor practices merely by enforcing the collective bargaining agreement it has with its employees.

The Board, in its brief to this Court, maintains that under *Interboro*, Section 7 rights arise whenever an employee has "an honest and reasonable belief" that his claim is supported by a provision in the collective bargaining agreement. Pet. Brief at 23. This theory is based on the notion, originating in *Bunney Bros. Construction Co.*, 139 N.L.R.B. 1516 (1962), that since the collective bargaining agreement is a product of concerted activity, a

claim made by an employee under such an agreement is an extension of such concerted activity which is protected under Section 7.

This fiction is the source of much confusion over the proper extent of the Board's jurisdiction in employee-discipline cases. Many courts, wisely, have rejected it, finding that for conduct to qualify as concerted activity,

it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.

Mushroom Transportation Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964). See *Royal Development Co. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983).

The mere link of an individual employee's action to past concerted activity is not sufficient. Hence, in *Mushroom Transportation*, *supra*, an employee's discussion with his employer of matters covered by the collective bargaining agreement was found not covered by Section 7. Similarly, in *Roadway Express, Inc. v. NLRB*, 700 F.2d 687 (11th Cir.), petition for cert. filed, No. 82-2061 (1983), the court held that neither an employee who challenged an earlier warning letter nor another employee who refused to drive a truck he felt was unsafe were engaged in concerted activity. See also *Kohls v. NLRB*, 629 F.2d 173 (D.C. Cir. 1980), cert. denied, 450 U.S. 931 (1981) (safety dispute); *ARO, Inc. v. NLRB*, 596 F.2d 713, 717 (6th Cir. 1979) (employee complaints about layoff); *NLRB v. C&I Air Conditioning, Inc.*, 486 F.2d 977 (9th Cir. 1973) (safety dispute).

The Board persists, however, in finding any employee claim or conduct that is even remotely related¹ to a collective bargaining agreement to constitute protected concerted activity under the Act.² In creating an unfair labor practice based upon this fiction, the Board interferes in private contractual relations, negates many bargained-for employer rights, and exceeds the jurisdiction which Congress contemplated for it.

A. Grievance Arbitration Fully Protects the Contract Rights of Employees Without Board Involvement.

The *Interboro* doctrine frequently leads to absurd, and unjust, results. If, pursuant to a contract, an employer imposes discipline which the employee believes is unjustified, the proper course for the employee is to file a grievance through the arbitration procedure established

1. The Board seeks to have this Court adopt a standard whereby employee conduct is protected by Section 7 if there is a "reasonable nexus" between such conduct and collective action. Pet. Brief at 18-19. It fails, however, to provide any indication of what this "nexus" should entail. It also fails to present any affirmative evidence that Congress intended that Section 7, and the Board's jurisdiction, should be interpreted so broadly. Rather, it argues only that its interpretation is "not inconsistent" with Congress' intent. *Id.* at 15. In light, however, of Congress' explicit refusal to permit the Board to become involved in private contractual matters, see pp. 15-16, *infra*, there is little likelihood Congress could have intended that Section 7 should be read in a way which would result in the very Board involvement in contract interpretation and enforcement that it had forbidden.

2. The *Interboro* doctrine has received support from some circuits. See, e.g., *NLRB v. Ben Pekin Corp.*, 452 F.2d 205 (7th Cir. 1971); *NLRB v. Selwyn Shoe Mfg. Co.*, 428 F.2d 217 (8th Cir. 1970); *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967). But see *Ontario Knife Co. v. NLRB*, 637 F.2d 840 (2d Cir. 1980).

by the parties under the contract. If the employee is right, he will be vindicated by the arbitrator. If the arbitrator finds that the employee is wrong, the employee under *Interboro* may get a second chance in the form of an unfair labor practice charge before the Board. This has the effect of negating the arbitration process and completely displacing the collective bargaining agreement.

Neither the Board nor the unions contend that the arbitration process is defective or unfair to the typical grieving employee. This Court, in fact, once described the no-strike clause as the union's *quid pro quo* for the employer's acceptance of binding grievance arbitration. *Boys Markets v. Retail Clerks Union*, 389 U.S. 235, 248 (1970). The private settlement of disputes through grievance arbitration is a cornerstone of our national labor policy. Congress established in Section 203(d) of the Labor Management Relations Act that

[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

29 U.S.C. §173(d). This Court recognized in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960), that the arbitration of grievances is "a major factor in achieving industrial peace," and this Court consistently has favored resort to arbitration. See, e.g., *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397 (1976); *William E. Arnold Co. v. Carpenters District Council*, 417 U.S. 12 (1974); *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964). Moreover, this Court, in *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974), established a "presumption of arbitrability" for safety disputes arising under a contract. *Id.* at 379.

Recently, this Court emphatically reaffirmed the principle that contractual disputes should be left to the arbitrator. In *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975), one issue was whether the contractual grievance procedure was sufficient to determine whether the employer had engaged in racial discrimination in violation of terms of the contract. This Court observed that clearly it was:

The collective bargaining agreement involved here prohibited without qualification all manner of invidious discrimination and made any claimed violation a grievable issue. The grievance procedure is directed precisely at determining whether discrimination has occurred. That orderly determination, if affirmative, could lead to an arbitral award enforceable in court.

Id. at 66 (footnotes omitted).

The defects in *Interboro* become most apparent when an employee refuses to obey a supervisor's directive which the employee feels is in violation of the contract. This occurs frequently in the area of employee scheduling. For example, in *Michigan Screw Products Division of MSP Industries Corp.*, 242 N.L.R.B. 811 (1979), an employee repeatedly refused to accept overtime assignments, believing that the bargaining agreement permitted him to do so. He was discharged for his refusal. Instead of pursuing a grievance through the contractually-established procedure, he filed a charge with the Board. The Board found the employee's good faith belief in the correctness of his position sufficient to justify his refusal to work.

The Board, in permitting employees to refuse to work or follow a supervisor's directive on the basis of their own subjective interpretations of their contract, radically alters traditional industrial relations practice and invites anarchy in the workplace. The Board, through *Interboro*, removes

the employer's right to direct his workforce. It sanctions all manner of employee insubordination on the mere basis of an employee's own belief that his conduct is justified.³ As two long-time authorities on industrial relations have pointed out, however,

[i]t is a well established principle that employees must obey management's orders and carry out their job assignments, even if believed to violate the agreement, then turn to the grievance procedure for relief.

F. Elkouri & E. Elkouri, *How Arbitration Works*, 671 (3d ed. 1981) (hereinafter "Elkouri").

Courts routinely uphold this "work now, grieve later" principle. In *NLRB v. Maryland Shipbuilding and Drydock Co.*, 683 F.2d 109 (4th Cir. 1982), an employee felt that his work assignment was unsafe and that he was not obligated under the contract to perform it. His supervisor advised him to file a grievance at the end of his shift. Instead, the employee continued to refuse the assignment and pursued his complaint himself during his working time. He was fired, and the Board found a violation of his Section 7 rights. The Fourth Circuit emphatically disagreed, finding that the employee

was entitled to file a grievance with respect to the work assignment and press it to arbitration, and any suspension of work in lieu of arbitration was in violation of the contract.

3. The Board, in applying *Interboro*, does not even require that an employee base his belief on the contract. In *John W. Sexton & Co.*, *supra*, 217 N.L.R.B. 80, the Board declared that Section 7 "protects employees['] attempts . . . to implement the terms of bargaining agreements irrespective of whether . . . the employees . . . are even aware of the existence of such agreements." *Id.* By protecting the *ex post* rationalization of conduct which was not even based on any good faith belief at the time it was engaged in, the Board allows the workplace to be governed by employee whim rather than by the rule of the contract.

Id. at 112. In *Roadway Express, supra*, 700 F.2d 687, an employee had been erroneously issued a warning letter by his employer. After notifying the employer of the mistake and being assured that the matter would be corrected, he ignored orders to return to work and continued to press the issue. He was then issued a reprimand for wasting time. The Eleventh Circuit refused to enforce the Board's finding that the employee's Section 7 rights were violated. The employee was disciplined not for asserting his contract right to an accurate disciplinary record, as the Board held, but for disobeying his employer's directive to return to work and make his inquiries through the proper contractual channels.

In the case presently before this Court, the bargaining agreement permitted an employee's *justified* refusal to operate unsafe equipment.⁴ The Board, however, found an employee who had a good faith, but not necessarily justified, belief that his truck was unsafe to be protected in his refusal to drive. It effectively sanctioned the employee's violation of his collective bargaining agreement. This the Board cannot do.

Undoubtedly, every employee will not always be satisfied with the remedies provided him by grievance arbitration. It may also happen that an employee's union may not share the employee's conviction about the merits of his cause and decline to prosecute it to the fullest possible extent.⁵ While this arguably may constitute a shortcoming

4. The contract states, in pertinent part: "It shall not be a violation of this Agreement where employees refuse to operate [unsafe] equipment unless such refusal is unjustified." *City Disposal Systems, Inc.*, 256 N.L.R.B. 451, 452 (1981). See also *National Master Freight Agreement*, Art., 16, §1 (1979).

5. Such occurred in this case, as the complaining employee's union found no merit in his safety objections, and thus declined to process his grievance to arbitration for his discharge over the dispute. See *City Disposal Systems, Inc.*, *supra*, 256 N.L.R.B. at 453.

in the grievance arbitration system, it cannot justify the Board's assertion of jurisdiction over contract issues in order to guarantee satisfaction of every claim of every employee, as some have suggested. See, e.g., *General American Transportation Corp.*, 228 N.L.R.B. 808, 813 (1977) (Chairman Murphy, concurring); Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U.Pa.L.Rev. 286, 358 (1981); Note, *National Labor Relations Act Section 7: Protecting Employee Activity Through Implied Concert of Action*, 76 Nw.U.L.Rev. 813, 828-29 (1981). Indeed, what this view in effect holds is that if a union is incapable of effectively representing its membership, the government must step in and assume the union's role. Such a notion, however, is entirely inconsistent with the concept of industrial relations which has long prevailed in this country.

The costs, as well as the benefits, of grievance arbitration are apparent to the employee at the time he votes for a bargaining representative in a union election or chooses to accept employment at a firm under union contract. In *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), this Court stated:

Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents.

Id. at 338. See also *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

It must be recognized that employees already have numerous protections against union abuse of their rights. Unions are held by this Court to a duty of fair representation in processing employee grievances. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). The right of employees to present grievances to the employer independently of their union is protected by Section 9(a) of the Act, 29 U.S.C. §159(a). Employees are protected by Section 8(b)(1)(A) of the Act, 29 U.S.C. §158(b)(1)(A), against union interference with their right to engage in concerted activity. They have the right under Section 9(c)(1)(A) of the Act, 29 U.S.C. §159(c)(1)(A), to petition for decertification of a union of which they disapprove. Other protections are available as well. See *Emporium Capwell, supra*, 420 U.S. at 64-65.

Employees, therefore, are adequately protected by existing law against union capriciousness. When they have freely chosen to be represented by a union and have bargained for binding grievance arbitration, they must be held to that bargain. If the arbitrator finds that an employee was justified in his contractual claim and that his employer's disciplinary action was therefore unwarranted, the arbitrator typically will order that the employee be reinstated with full back pay. See, e.g., *Consolidated Edison Co. of New York, Inc.*, 71 Lab. Arb. 238 (1978) (Kelly, Arb.); *Ozark Border Electric Cooperative*, 67 Lab. Arb. 328 (1976) (Maniscalco, Arb.). See generally, Elkouri, *supra*, at 648. Grievance arbitration provides a full, fair and effective remedy to the employee who is wrongly disciplined by his employer. There is no need for Board intervention in this area.⁶

6. It is not contended here that the Board should defer its jurisdiction to the arbitrator under the doctrines established in *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955) and *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971). Rather, it is the position of this Amicus that the Board has no jurisdiction in this area to defer. See *Kohls, supra*, 629 F.2d at 179.

B. The Board, Through *Interboro*, Improperly Interferes With the Contract Rights of the Employer.

Interboro deprives the employer of the benefit of his bargain. The Board, through *Interboro*, usurps the employer's right to manage the workplace in an efficient and orderly manner—the manner contemplated by the parties to the bargaining agreement. An employer generally has the right under a contract to discharge or discipline employees for just cause, including misconduct or failure to abide by the contract. When the employer does so, however, under *Interboro* he may be punished by the Board merely for interpreting and applying the terms of the contract. See Pet. Brief at 22 n. 10, 24 n. 12, 25 n. 14. For even if an arbitrator finds an employer's disciplinary action to be justified, under *Interboro* the Board may substitute its judgment for that of the arbitrator and order the employee reinstated.

This anomaly results because the Board applies a "good faith belief" standard in determining whether an employee's actions are protected under Section 7 of the Act. Most collective bargaining agreements explicitly or implicitly provide, however, that an employee's belief that he has a right to engage in (or refrain from) certain conduct must be "justifiable" or "reasonable." These standards largely depend on specific circumstances and the judgment of the arbitrator, but more than a mere personal belief generally is required. See Elkouri, *supra*, at 674-75. Under *Interboro*, therefore, the Board effectively requires an employer to prove not that an employee's actions were unjustified under the contract, but that an employee acted in bad faith in asserting a contract claim, before he is permitted to discipline that employee for breach of contract.

In substituting its own standard for the standard contractually established by the parties, the Board effectively

re-writes the collective bargaining agreement. It deprives the employer of his right to discipline an employee who wrongly acts on a claimed right under the contract contrary to his employer's directive. The Board does not have the authority to do this. In *Porter Co. v. NLRB*, 397 U.S. 99 (1970), this Court recognized "the fundamental principle that the National Labor Relations Act is grounded in the premise of freedom of contract." *Id.* at 107. The Court in *Porter* went on to declare that the Board

is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement.

Id. at 102. This Court on several occasions has recognized that the Board has no power to alter the rights of parties under a contract, or to impose "its own view of what the terms and conditions of the labor agreement should be." *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 427-28 (1967). See also *NLRB v. Strong*, 393 U.S. 357 (1969); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

Where the parties to a labor agreement bargain for a procedure by which to settle disputes arising under such agreement,⁷ the Board has no authority to interfere with

7. In industries where safety is frequently an issue, the parties to the contract frequently create a shop-floor procedure for settling safety disputes, in addition to standard grievance arbitration procedures. In *Roadway Express*, *supra*, 700 F.2d 687, for example, the contract provided that following the pre-trip safety check by the maintenance department, if an employee believed a vehicle to be unsafe, he was first to turn it over to the garage supervisor for inspection. If the supervisor found no defects the employee would be directed to operate the vehicle. If the employee was still not satisfied, he could request that a Class A union mechanic inspect the vehicle for a third opinion. If the vehicle passed the union mechanic's scrutiny also, the local agreement provided that the complaining employee be issued a written reprimand for delaying freight. See *Roadway Express, Inc.*, 257 N.L.R.B. 1197, 1198 (1981), *enf. denied*, 700 F.2d 687 (11th Cir.), petition for cert. filed, No. 82-2061 (1983). When the employee in *Roadway Express* demanded a union mechanic's

this procedure. *Kohls, supra*, 629 F.2d 173, contains facts nearly identical to those before the Court here. An employee refused to perform a work assignment, claiming a good-faith belief that his equipment was unsafe. The employer considered his refusal to be "unjustified," under the contract term that allowed a driver to refuse to operate equipment he considers unsafe unless such refusal is "unjustified." The employer discharged the employee. The Board found that the employer committed an unfair labor practice by discharging the employee, allegedly for asserting his Section 7 rights under the Act. The District of Columbia Circuit, however, declared that the employee's claim was solely a contractual one, "unrelated to an unfair labor practice, [and] the Board has no authority to resolve the contractual issue." *Id.* at 179.

In order to evade this Court's repeated directives not to become involved in matters of private contract, the Board, through *Interboro*, has thus created unfair labor practices out of mere contractual disputes. Its source of authority for such a move is something of a mystery since Congress itself expressly declined to take such action. In its 1947 amendments to the Act, Congress considered and rejected a proposed Section 8(a)(6) of the Act, which would have made an employer's breach of a collective bargaining agreement an unfair labor practice. The House of Representatives objected to this provision

on the ground that it would have the effect of making the terms of every collective agreement subject to interpretation and determination by the Board.

Footnote continued—

inspection, such inspection revealed no defects, and the employee was issued a reprimand for wasting time in accordance with the contract. The Board, under *Interboro*, found the employer guilty of an unfair labor practice. *Id.* at 1197. In doing so, the Board ignored the fact that concomitant with the employee's right to ensure the safety of his vehicle was the employer's negotiated right to discipline the employee for using the contractual procedure as a means of wasting time.

Statement of Senator Taft, 93 Cong. Rec. 6443 (1947). See *Dowd Box v. Courtney*, 368 U.S. 502, 510-11 (1962). In applying *Interboro*, the Board engages in the very interpretations and determinations of collective bargaining agreements which Congress forbade. The Board has "moved into a new area of regulation which Congress had not committed to it," in flagrant disregard also of this Court's directions to the contrary. *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960). See also *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965) ("[T]he Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management").

II.

If, Under *Interboro*, a Single Employee's Refusal to Work Is Implicitly Concerted Activity, Then It Is Also Implicitly a Strike in Violation of a Contractual No-Strike Clause.

Unorganized workers may invoke Section 7 of the National Labor Relations Act, to justify a concerted refusal to work. In *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), this Court held that a walkout by non-union employees in protest of a cold workplace was concerted activity protected by Section 7. The court pointed out, however, that the employees involved

had no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer. Under these circumstances they had to speak for themselves the best they could.

Id. at 14.

Unionized employees, by contrast, generally do not enjoy the same broad protection of Section 7 as do their

unorganized counterparts. In collective bargaining agreements, unions may waive the right of their membership to strike, *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956), and many modern contracts contain no-strike clauses. Typically, the no-strike provision is accompanied by a clause in which the employer and the union agree to settle disputes arising under the contract through a grievance arbitration procedure.⁸

Under a no-strike clause, employees waive their Section 7 right to engage in concerted refusals to work. See *Fournelle v. NLRB*, 670 F.2d 331, 335 (D.C. Cir. 1982), and any work stoppage constitutes grounds for dismissal. *Mastro Plastics, supra*, 350 U.S. at 280. Work slowdowns are also prohibited under a no-strike clause. *Seattle Times Co. v. Seattle Mailer's Union*, 664 F.2d 1366, 1368 (9th Cir. 1982). Unionized employees are thus bound to follow grievance arbitration procedures established under their contract in lieu of collectively pursuing their own "self-help" remedies.

An employer commits an unfair labor practice under Section 8(a)(1) of the Act by interfering, restraining or coercing employees in the exercise of their Section 7 rights. 29 U.S.C. §158(a)(1). Since employees waive their Section 7 rights under a no-strike clause, however, it follows that an employer cannot commit an unfair labor practice by disciplining employees for a breach of their contract's no-strike clause.

Several courts of appeals have refused to enforce Board orders finding employers in violation of Section

8. The contract between the employer and the union in the case presently before the Court contains both no-strike and binding arbitration provisions. In one sample of collective bargaining agreements nationwide, 97% contained arbitration clauses and 94% contained agreements not to strike. 2 Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts* §§51:1, 77:1 (1983)

8(a)(1) for discharging employees who walk off the job in violation of a no-strike clause. In *Irvin H. Whitehouse & Sons Co. v. NLRB*, 659 F.2d 830 (7th Cir. 1981), the court upheld the employer's discharge of two workers who refused to work under what they believed were unsafe conditions. The court stated that the employees' refusal to work "was a method of protest they had given up in return for binding arbitration." *Id.* at 836. In *Food Fair Stores, Inc. v. NLRB*, 491 F.2d 388 (3d Cir. 1974), the court denied Section 7 protection to twenty-one drivers who walked out in a dispute over working conditions. Since the employees breached their obligation not to strike, the court declined to find that the employer had committed an unfair labor practice in firing them.

The Board, in *Interboro*, invented the notion that when a single employee asserts a right under a collective bargaining agreement, he implicitly engages in concerted activity subject to the protection of Section 7 of the Act. The Board assumes, under the *Interboro* doctrine, that an employee who speaks or acts on a subject covered in a collective bargaining agreement is speaking or acting in the name of his fellows. The Board considers the employee's actual intent to be irrelevant. As it states in the brief it has submitted to this Court, the *Interboro* doctrine depends on the idea that

an employee who speaks up concerning an employer's action that may violate the collective agreement is acting in the interest of all, whether he is acting out of conscious altruism or merely out of a desire to preserve his own immediate stake in the controversy.

Pet. Brief at 21. The Board's theory collapses, however, upon an examination of those rights which the Board claims the employee asserts.

If an individual employee putatively acts on behalf of a group of his fellows, he can assert only those rights which the group itself could assert. It is clear, however, that if the group were covered by a no-strike clause and refused to perform a work assignment an illegal strike would occur. *Interboro* thus presents a paradox wherein an individual can assert the rights of a group which the group itself cannot exercise. The Board must not be permitted to maintain this inconsistency in the law. If employees collectively have no right to engage in a work stoppage in violation of their contract, an individual employee should not be permitted to do so on a theory of implied concerted activity.

In *Kohls*, *supra*, 629 F.2d 173, an employee, covered by the same contract language as in this case, refused to drive a truck which he contended was unsafe. He was discharged for his refusal and he filed a grievance. He subsequently withdrew the grievance and filed an unfair labor practice charge, alleging that the employer violated his Section 7 rights by firing him. The Board found that the employer committed an unfair labor practice, but the Court of Appeals disagreed. The court held that *Interboro* did not apply to the facts of the case, primarily because the employee "did not assert an interest on behalf of anyone other than himself." *Id.* at 177. The court also stressed, however, that the employee could not himself have engaged in activity which his union could not undertake:

We should note that an anomalous result would be reached if we were to enforce the Board's finding of an unfair labor practice in this case. During oral argument, counsel for the Board conceded that, absent a claim rooted in Section 502 of the LMRA, the union could not have urged its members to engage in con-

certed action to enforce the applicable terms of the contract between the [union and the employer] It thus seems contradictory for the Board to argue here that an employee, acting pursuant to the same contract that binds the union, can engage in "concerted" activity that the union would be barred from taking.

Id. at 178 (footnote omitted). If an employee can justify to an arbitrator his refusal to perform a work assignment, he should do so. If he cannot, this Court should not allow the Board to permit him to engage in a strike in violation of his contract under the fiction of it being "implied concerted activity."

Much of the controversy over the *Interboro* doctrine, therefore, misses an important point. While the issue of whether the action of an individual employee can be construed as being concerted is most frequently debated, equally significant is whether such action is *protected* by the Act. Where employees have bargained away their right to strike, any subsequent refusal to work not consistent with the terms of the contract is clearly not protected, whether on the part of one employee, two employees, or the entire shop. See *Economy Tank Line*, 99 LRRM 1198 (1978) (NLRB General Counsel Advice Memorandum).

The argument advanced by the Board in this case, Pet. Brief at 26-27, and put forth by others as well,⁹ that *Interboro* should be affirmed because an employee's ability to assert a collective right should not depend upon the fortuitous presence of another employee, is but a makeweight. In refusal to work situations, it is irrel-

9. See, e.g., *McLean Trucking Co. v. NLRB*, 689 F.2d 605 (6th Cir. 1982); Gorman & Finkin, *supra*, 130 U.Pa.L.Rev. at 347-50.

evant that a driver may be accompanied by a helper on the truck he refuses to drive, or that he files a grievance with his union, or even that he refuses to work on instructions from his union. See *McLean Trucking, supra*, 689 F.2d 605. If an employee covered by a no-strike clause refuses a work assignment, he breaches his collective bargaining agreement,¹⁰ and this Court has held that his breach is not protected activity under Section 7 of the Act. *Washington Aluminum, supra*, 370 U.S. at 17; *NLRB v. Sands Mfg. Co.*, 306 U.S. 508, 514 (1939).

Finally, to allow an employee to refuse to work, in violation of the procedures established under the contract for settling workplace disputes, is in effect to allow him (and the group he putatively represents) to force the employer to modify the contract in his favor. This Court explicitly prohibited such a move in *Emporium Capwell, supra*, 420 U.S. 50.

In *Emporium Capwell* a group of minority employees objected to their employer's treatment of racial minorities. They filed a grievance through their union, but subsequently became disenchanted with the union's attempts to settle the dispute. They picketed the employer and distributed handbills to the employer's customers. When the employees refused to cease picketing and demanded to deal directly with the employer's president, they were discharged. Upon the filing of an unfair labor practice charge, the Board found that the employees' actions, while concerted, were not protected by Section 7 of the Act.

This Court upheld the Board's dismissal of the complaint. At issue was whether employees pursuing extra-contractual remedies through concerted activity were en-

10. The only exception is if his refusal is covered by Section 502 of the Labor Management Relations Act, which is addressed in Section III of this Brief, *infra*.

gaged in protected activity under Section 7, where they believed their employer discriminated against them on the basis of race in violation of a contract provision prohibiting such discrimination. This Court held that they clearly could not. The Court reasoned that to allow "self-designated representatives [who] purport to speak for all groups that might consider themselves to be victims of discrimination" to pursue a remedy outside of the contract, would impermissibly disrupt "the orderly collective bargaining process contemplated by the NLRA." *Id.* at 68-69.

Section 7 thus does not provide protection for employees who engage in "self-help" concerted activity against racial discrimination, even in spite of the "national labor policy [which] embodies the principles of nondiscrimination as a matter of highest priority." *Id.* at 66. It is therefore inconsistent that an employee under the guise of "constructive concerted activity" engaged in a safety dispute, or in any dispute with his employer, should have the aid of Section 7 and the Board in attempting to evade the contractual obligations of the employees on whose behalf the Board considers him to act.

III.

The Board Has Jurisdiction Over Employee Discipline Matters Covered by Contract in the Case of Safety Disputes Only When Such Disputes Are Covered by Section 502 of the Labor Management Relations Act.

Since an employee's refusal to work in protest over a safety dispute in the face of a no-strike clause is not protected under Section 7 of the Act, the Board is limited to asserting its jurisdiction in such cases only if Section 502

of the Labor Management Relations Act applies. That section states, in pertinent part:

[N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

Section 502 effectively creates an exception to a contractual no-strike clause, so that an employee's refusal to work in the face of "abnormally dangerous conditions" does not constitute a breach of the bargaining agreement. See *Economy Tank Line, supra*, 99 LRRM at 1199.

This Court, in *Gateway Coal, supra*, 414 U.S. 368, held that employees seeking coverage of Section 502 must present "ascertainable, objective evidence supporting [their] conclusion that an abnormally dangerous condition for work exists." *Id.* at 386 (emphasis supplied). This Court reversed the court below for

concluding that an honest belief, no matter how unjustified, in the existence of "abnormally dangerous conditions for work" necessarily invokes the protection of §502 Absent the most explicit statutory command, we are unwilling to conclude that Congress intended the public policy favoring arbitration and peaceful resolution of labor disputes to be circumvented by so slender a thread as subjective judgment, however honest it may be.

Id. at 385-86. Thus, this Court has established that concerted activity may not take the place of grievance arbitration except in the most extreme and well-documented cases.

The Board, in the case before this Court, seeks to avoid this Court's *Gateway Coal* decision by casting safety dis-

putes in terms of Sections 7 and 8(a)(1) of the Act. It applies a subjective "good faith" standard to an employee's belief that unsafe conditions exist,¹¹ effectively legislating Section 502 out of existence. Apart from being contrary to the intent of Congress and the mandate of this Court, this is also logically indefensible. The Board concedes that an employee is not covered by Section 7 if he protests only in his own right. See Pet. Brief at 16 n. 9. He is brought within the protection of Section 7 solely by means of the *Interboro* notion that he putatively represents his fellows in making his protest. As demonstrated in Part II of this Brief above, however, such an employee can assert no more rights in the name of the group than could the group itself assert. Under *Gateway Coal* the Board has no jurisdiction to protect the group in their refusal to work for safety reasons unless they can present the objective evidence required by Section 502.

Further evidence of Congress' intent that a worker may not evade a work assignment merely on his own subjective belief that his equipment is unsafe can be found in two other statutes. Section 405(b) of the Surface Transportation Assistance Act of 1982 provides in pertinent part:

No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions or privileges of employment for refusing to operate a vehicle . . . because of the employee's *reasonable* apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a *reasonable person*, under the circumstances then confronting the em-

11. See *City Disposal Systems, Inc.*, *supra*, 256 N.L.R.B. at 454.

ployee, would conclude that there is a bona fide danger of accident, injury or serious impairment of health, resulting from the unsafe condition.

49 U.S.C. §2305(b) (emphasis supplied).

Similarly, Section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. §660(c), protects employees who exercise rights granted under that Act. Pursuant to that Section, the Secretary of Labor promulgated a regulation protecting a worker's right not to accept a work assignment which threatens serious injury or death. 29 C.F.R. §1977.12(b)(2).¹² The regulation is clear, however, that

[t]he condition causing the employee's apprehension of death or injury must be of such a nature that a *reasonable person*, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury.

Id. (emphasis supplied). This Court upheld this regulation in *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980). Thus, Congress already has established safety standards to protect employees, and has made quite clear its intent that government protections are not to be triggered by anything less than objective evidence. The Board again exceeds its authority by attempting to legislate a further means of government involvement in employee safety, carrying a standard much lower than any ever set by Congress.

It must be emphasized, however, that the protection provided by federal law is not the employee's only, nor his best, protection against safety hazards. He is protected

12. It is significant that the regulations promulgated under Section 11(c) of the Occupational Safety and Health Act recognize the importance of the labor contract and arbitration by suggesting deferral to arbitration of the safety issue under the collective bargaining agreement. 29 C.F.R. §1977.18.

at all times by his bargaining agreement, which commonly imposes a much more flexible standard. For example, the contract in this case provides that an employee's refusal to operate unsafe equipment must be "justified." See *National Master Freight Agreement*, Art. 16, §1. If the employee's refusal meets that standard, he will prevail in arbitration even though he may not be able to present objective evidence. The important point, however, is that the contractual standard is to be applied by the arbitrator, not by the Board.

Once again, the issue is not one of adequately protecting employees, but one of expanding Board jurisdiction. The Board, in apparent disregard of the will of Congress and the mandates of this Court, has used the wholly impertinent "good faith belief" standard of Section 8(a)(1) of the Act to inject itself into employee safety disputes. The Board must be restricted from involving itself in any employee safety dispute covered by a collective bargaining agreement unless an employee comes forth with objective evidence of a hazard as required by Section 502.

CONCLUSION

Amicus Roadway Express, Inc. respectfully submits that for the above-stated reasons this Court should affirm the decision of the United States Court of Appeals.

Respectfully submitted,

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ALEXANDER L. STEVENS

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CITY DISPOSAL SYSTEMS, INC.
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

**BRIEF OF TEAMSTERS FOR A DEMOCRATIC
UNION AS *AMICUS CURIAE* IN SUPPORT OF
PETITIONER**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2386

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CITY DISPOSAL SYSTEMS, INC.
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

**BRIEF OF TEAMSTERS FOR A DEMOCRATIC
UNION AS *AMICUS CURIAE* IN SUPPORT OF
PETITIONER**

THE INTEREST OF *AMICUS CURIAE*

Teamsters for a Democratic Union ("TDU") is a voluntary unincorporated association of thousands of rank-and-file Teamster members seeking to reform and democratize their union, and in so doing, to make it more responsive to their needs. As is true for the International Brotherhood of Teamsters itself, the core of TDU's membership — and particularly of its predecessor organization, PROD — is employed in the trucking industry as drivers and warehouse workers.

One of the significant shortcomings of the Teamsters union has been its lack of commitment to occupational safety and health in the trucking industry, a matter of concern not only to its members but to the general public who must share the road with vehicles which, all too often, are unsafe. Although most trucking contracts contain strong safety clauses similar to the one between Teamsters Local 247 and City Disposal Systems (Joint Appendix 64-65), enforcement of those clauses tends to be left to the initiative of individual truck drivers who must be willing to risk their jobs to do so. Indeed, it was not until several years after the formation of TDU's predecessor, the Professional Drivers Council for Safety and Health, which became known as PROD, that the Teamsters even formed a Safety Department and hired a Safety Director.

A large number of TDU/PROD members have been involved over the years in cases requiring application of the rule at issue here, which was first approved in *NLRB v. Interboro Contractors*, 388 F.2d 495 (2d Cir. 1967). Moreover, attorneys for TDU members as intervenors have played a significant role in the shaping of the law in this area.¹ TDU files this brief, by written consent of the parties, in order to discuss the special circumstances facing a driver who wishes to protest an assignment to drive an unsafe truck, and to show that the interests not only of truck drivers but also of the public at large depend on the continued protection of drivers who refuse to operate trucks because they reasonably believe them to be unsafe and thus contrary to the requirements of their collective bargaining agreement.

¹ E.g., *Kohls v. NLRB*, 629 F.2d 173 (D.C. Cir. 1980); *United Parcel Service*, 234 NLRB No. 85 (1978), *enf. denied*, No. 78-1258 (6th Cir., Oct. 12, 1979); *Banyard v. NLRB*, 505 F.2d 342 D.C. Cir. 1974), *on remand*, *Roadway Express*, 217 NLRB No. 49 (1975).

SUMMARY OF ARGUMENT

TDU agrees with the Board that the *Interboro* doctrine is a proper application of § 8(a)(1) of the National Labor Relations Act. However, this case does not require the Court to decide that question for all employees in all industries. A truck driver's job is unusually dangerous, and contacts with the employer concerning safety questions normally occur in isolation from other drivers. In these circumstances, appeals to the collective bargaining agreement, which is enforced by the union, are a driver's principal source of collective support for a refusal to take unsafe equipment. Accordingly, employees in the trucking industry are entitled to protection under § 7 when, based upon a reasonable belief that a truck is unsafe, they refuse to drive it pursuant to a reasonable belief that they have a right to do so under their collective bargaining agreement and then grieve a subsequent discharge as provided by the agreement.

ARGUMENT

A TRUCK DRIVER WHO, PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT, REFUSES TO DRIVE A TRUCK AS UNSAFE AND GRIEVES HIS CONSEQUENT DISCHARGE, IS ENGAGED IN PROTECTED CONCERTED ACTIVITY SO LONG AS HIS BELIEF THAT THE TRUCK WAS UNSAFE WAS BOTH SINCERELY HELD AND REASONABLE IN LIGHT OF THE INFORMATION AVAILABLE TO HIM AT THE TIME OF HIS REFUSAL.

TDU endorses the arguments of the Board in support of the *Interboro* doctrine generally. In particular, we commend to the Court's examination the careful review of the legislative history of § 7 contained in Gorman and Finkin, *The Individual and the Requirement of "Concert" Under*

the National Labor Relations Act, 130 U. Pa. L. Rev. 286, 331-346 (1981). Our purpose here, however, is to argue a more narrow point, concerning the particular suitability of *Interboro* as applied in the trucking industry.

Although *NLRB v. Interboro Contractors*, 388 F.2d 495 (2d Cir. 1967), arose in the construction industry, its rule has subsequently been applied far more frequently among truck drivers than any other occupation. *E.g.*, *McLean Trucking Co. v. NLRB*, 689 F.2d 605 (6th Cir. 1982); *Kohls v. NLRB*, 629 F.2d 173 (D.C. Cir. 1980); *Bloom v. NLRB*, 603 F.2d 1015 (D.C. Cir. 1979); *Roadway Express v. NLRB*, 532 F.2d 751 (4th Cir. 1976), *aff'g without opin.*, 217 NLRB No. 49 (1975); *NLRB v. Adams Delivery Serv.*, 523 F.2d 96 (9th Cir. 1980); *NLRB v. Buddies Supermks*, 481 F.2d 744 (5th Cir. 1973); *Illinois Ruan Transp. Corp. v. NLRB*, 404 F.2d 274 (7th Cir. 1968). And, in the majority of these cases, the problem arises when a driver refuses to drive a truck because he believes it to be unsafe. There are two reasons for this recurring problem, both of which demonstrate why the *Interboro* doctrine should be upheld in this context.

The first is that truck-driving is an extremely dangerous profession. Driving long hours, at high speeds, in vehicles weighing up to 80,000 pounds and measuring up to 90 feet in length, is a high risk occupation for both the driver and other motorists.

The risk is compounded by the fact that vehicle safety is well below par. According to the Bureau of Motor Carrier Safety, in 1980, the year in which the NLRB heard this case, some 2.5 violations were found for each safety inspection, and one out of every two inspections produced a violation serious enough to require that the vehicle be taken out of service. *BMCS, 1980/1981 Roadside Vehicle Inspection Report* 17 (1982). Therefore, it is not surprising that, although coal-mining has been considered the most dangerous job in the United States, the transportation in-

dustry produced almost twice as many fatal occupational injuries in 1980.² Indeed, in that year trucking and warehousing produced more per capita injuries leading to the loss of work days than any industry save the manufacture of lumber and wood products. Bureau of Labor Statistics, *Occupational Injuries and Illnesses in the United States, 1980* (1982), at 30-32. See also Baker, et al., *Fatal Occupational Injuries*, 248 J. Am. Med. Ass'n 692 (1982) (Maryland study shows that in 1978 more fatalities were caused by road vehicles than by any other cause; half of this category were truck drivers killed in crashes). But safety costs employers money in two ways: the actual cost of maintaining and repairing vehicles and the unproductive but compensated time spent by drivers waiting for a vehicle to be returned to proper condition. Thus, employers have a great incentive to pressure drivers to take marginal vehicles on the road. See, e.g., J.A. 52 and Tr. 354-356 (great financial pressure on employers to use its own trucks "at all cost").

Although the drivers themselves obviously have a strong interest in reducing this carnage, the general public interest is even stronger. See *Banyard v. NLRB*, 505 F.2d 343, 347 (D.C. Cir. 1974). There are some 44 accidents every hour involving large trucks alone. In 1981, this produced 5,779 fatalities, of which only 1,131 were occupants of the truck (mostly drivers). Eicher, Robertson and Toth, *Large-Truck Accident Causation* xi, 1-1 (NHTSA 1982). These problems are amply reflected by the record of this case, which shows that one of the accidents caused by truck 244's bad brakes led to a chain collision on an interstate highway involving three cars and another truck. Tr. 29-34.

Second, the *Interboro* problem frequently arises in trucking because, unlike workers in manufacturing, min-

²The fatality figures involve all forms of mining and mineral extraction, and all forms of transportation and utilities. Coal mining and trucking comprise the most dangerous portions of each category.

ing, construction or almost any other industry, the drivers do not work side-by-side with other employees. Rather, their contacts with management personnel are almost always on a one-to-one basis. Thus, a driver begins an assignment, receives a truck, performs the pre-trip safety inspection, and decides whether or not to resist pressure from the employer to accept unsafe equipment, in isolation from other drivers. Most of the working day is spent alone in the cab of a tractor and, if a safety problem arises on the road, the driver must deal with the employer by telephone, with no fellow employees present.

Although there may be workers from other departments present at the beginning or end of the trip, they are of little collective assistance. For example, the only workers present for James Brown's meetings with management were a janitor, who knew nothing about trucks, Tr. 153; the mechanics, whose work a driver is challenging when he refuses an unsafe truck and who may well belong to a separate bargaining unit represented by another union, Tr. 368;³ and another driver who was waiting for his own truck to be repaired so that he could leave on an assignment. J.A. 19. In these circumstances, it is the collective bargaining agreement, which is enforced by the union, that is the primary if not the only source of support for a driver who seeks concerted assistance from his fellow employees in refusing to drive an unsafe truck.

The Court of Appeals viewed Brown's "individual" interest in being assigned a safe truck as separable from the collective support which he received when he refused to drive truck 244 because it was unsafe. It recognized that Brown and the union acted in concert concerning Brown's grievance over his discharge, but stated that "the union made no effort to protest the use of the truck." 683 F.2d

³City Disposal's mechanics reacted with hostility to drivers who brought trucks in for repairs. Tr. 123.

at 1007. We respectfully submit that the Court of Appeals' ruling in this regard rests on a false dichotomy. The only practical way for a driver like Brown to take effective action to protest working conditions that he reasonably believes to be unsafe is to refuse to drive the truck, pursuant to the protections of the collective bargaining agreement. If the driver accepts a dangerous truck and then files a grievance, the assignment will be completed by the time the grievance can be heard. But by that point, no relief will be available, and the grievance will have become moot. Moreover, the risks, both to the driver and to the public, attendant upon driving an unsafe truck, will not in any way be abated by a post-assignment grievance. Thus, the only way for the drivers to protect their own interests, and those of others on the road, is to refuse the truck, be disciplined, and then grieve the discipline.

This, indeed, is the means of safety enforcement contemplated by Article XXI of the collective bargaining agreement in this case. Section 1 generally prohibits the employer from requiring the operation of unsafe equipment, and specifically authorizes drivers to refuse such equipment "unless such refusal is unjustified." J.A. 64. Section 4 prohibits the employer from requiring any driver to operate unsafe equipment which another employee has reported as unsafe until the mechanical department certifies it as safe. J.A. 65. The only practical way to invoke these provisions is to refuse a truck and, in the event of discipline, use the grievance procedure to determine whether the refusal was "unjustified."

It can scarcely be gainsaid that the reasonable pursuit of grievances in the manner contemplated by the collective bargaining agreement — *i.e.*, an appeal for support to other employees, through the union — constitutes "concerted" activity. *E.g.*, *NLRB v. Quality Mfg. Co.*, 481 F.2d 1018, 1021 (3d Cir. 1973), *rev'd on other grounds sub nom. ILGWU v. Quality Mfg. Co.*, 420 U.S. 276 (1975).

See also *Roadway Express v. NLRB*, 700 F.2d 687, 693-694 (11th Cir. 1983) (reluctantly rejecting *Interboro*, absent indication by higher authority, because of Fifth Circuit precedent). Such action is concerted even if the grievance is addressed to a particular truck, and without respect to the merits of the grievance, *NLRB v. Adams Delivery Service*, 623 F.2d 96, 100 (9th Cir. 1980); *NLRB v. Selwyn Shoe Mfg. Corp.*, 428 F.2d 217 (8th Cir. 1970), although it may be protected only if the employee has a good faith and reasonable belief that the collective bargaining agreement has been violated. *Banyard v. NLRB*, 505 F.2d 342, 348 (D.C. Cir. 1974).

Here there is no question that Brown's refusal to drive truck 244 was part of a concerted activity among City Disposal's drivers. The truck's brakes were notorious among the drivers. Tr. 144. On the Saturday before Brown refused to take truck 244 on the road, another driver, Frank Hamilton, brought the truck back from work and, with Brown present, insisted that the brakes be repaired. The head mechanic said that the brakes could not be fixed over the weekend because the right kind of brake shoes were not in stock. J.A. 7-8. When Hamilton did not come to work on Monday morning and Brown was told to drive truck 244, it fell to Brown to enforce Hamilton's demand for brake repairs by refusing the truck until repairs were made.⁴

In the discussion leading to Brown's discharge, both Brown and the supervisor recognized the collective nature

⁴The Court of Appeals believed that Brown was acting individually rather than in concert, citing the fact that he failed to post a notice concerning the brakes or to warn other employees about the brakes. 683 F.2d at 1007. This ignores the fact that Brown was not acting based on his own experience driving the truck, but in response to a warning from another driver. It also rests on another false dichotomy, because the question is not whether Brown could have done *more*, but whether what he did was concerted action. Surely, the action of a driver who responds to the warning of another driver is just as concerted as the action of the driver who issues the warning.

of the problem. The supervisor complained that all the drivers were refusing to take equipment, that these refusals were hurting the company, and that he was "tired of hearing" such complaints. J.A. 11-12. Brown, for his part, replied, "What are you going to do, put the garbage ahead of the safety of the men?" J.A. 12. And, when Brown was fired for refusing the truck, the union joined his protest by demanding that he be put back to work because his refusal was justified. J.A. 31-32. Although the union ultimately decided not to take Brown's case to arbitration, which it was entitled to do as an exercise of discretion under *Vaca v. Sipes*, 386 U.S. 171 (1967), that does not negate either the concerted character of the activity for which he was discharged or the reasonableness of Brown's belief at the time that the truck was unsafe.

Furthermore, there is substantial evidence in the record to support the Board's finding that Brown's belief that the brakes were unsafe was sincere and reasonable, and therefore that his concerted activity was protected. Truck 244's brakes were notoriously difficult to handle. Tr. 144.³ Sometimes they worked and sometimes they didn't work at all, so that it took unusual skill, caution and experience to drive that tractor. Tr. 143. Only two days before his refusal, Brown was almost hit by truck 244, and he had been present when even the truck's experienced driver told the mechanics that he could no longer operate it safely without major brake repairs. J.A. 7, Tr. 142. He also heard the mechanics say that the repairs could not be done over the weekend, J.A. 7, and in fact there is nothing in the record to suggest that City Disposal had any work done — not to speak of obtaining the approval required by Article XXI, Section 4 of the contract — before Brown was asked to drive the truck.

³When Brown previously served as a supervisor, he had received numerous complaints about the truck. J.A. 8. See also Tr. 25.

Finally, although the truck was involved in no accidents in the few days following Brown's refusal to drive it, both drivers who took it found the brakes to be unsafe and in need of repairs. Tr. 143-144 (Hamilton); Tr. 229, 237-238, 245-246 (Tyner believed brakes were unsafe and posted notice to that effect). Whether or not the brakes were in fact unsafe, Brown's belief was both sincere and reasonable given the facts available to him, and the Board's finding in that regard is supported by substantial evidence.

To require further evidence in situations such as this would only result in drivers taking more unsafe trucks on the road, which will greatly increase the risk of injury to both truck drivers and the general public. James Brown acted in accordance with the principles of concerted activity in protesting the assignment of what he reasonably believed to be an unsafe truck. Accordingly, both the National Labor Relations Act and sound public policy dictate that he be protected from discipline on account of that activity.

CONCLUSION

For these reasons, the decision of the Court of Appeals should be reversed, and the case remanded with instructions to deny the petition for review and grant the application for enforcement of the Board's order.

Respectfully submitted,

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June 11, 1983

No. 82-960-CFX
Status: GRANTED

Title: National Labor Relations Board, Petitioner
v.
City Disposal Systems Inc.

Docketed:
December 9, 1982

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Opperwall, Theodore R.

Entry	Date	Note	Proceedings and Orders
1	Oct 8 1982		Application for extension of time to file petition and order granting same until November 19, 1982 (O'Connor, October 12, 1982).
2	Nov 8 1982		Application for further extension of time to file petition and order granting same until December 19, 1982 (O'Connor, November 9, 1982).
3	Dec 9 1982	G	Petition for writ of certiorari filed.
4	Jan 19 1983		DISTRIBUTED. February 18, 1983
5	Feb 2 1983	F	Response requested.
6	Mar 4 1983		Brief of respondent City Disposal Systems, Inc. in opposition filed.
7	Mar 9 1983		DISTRIBUTED. March 25, 1983
8	Mar 18 1983	X	Reply brief of petitioner filed.
9	Mar 28 1983		Petition GRANTED. *****
11	May 3 1983		Order extending time to file brief of petitioner on the merits until June 11, 1983.
12	May 25 1983		Joint appendix filed.
13	Jun 3 1983		Record filed.
14	Jun 3 1983		Certified record received.
15	Jun 10 1983		Brief amicus curiae of Teamsters for a Democratic Union filed.
16	Jun 13 1983		Order further extending time to file brief of petitioner on the merits until June 17, 1983.
17	Jun 17 1983		Brief amicus curiae of AFL-CIO filed.
18	Jun 17 1983		Brief of petitioner filed.
20	Jun 22 1983		Order extending time to file brief of respondent on the merits until August 19, 1983.
21	Aug 19 1983		Brief of respondent City Disposal Systems, Inc. filed.
22	Aug 19 1983		Brief amicus curiae of Legal Foundation of America filed.
23	Aug 20 1983		Brief amicus curiae of Roadway Express, Inc. filed.
24	Aug 18 1983		Brief amicus curiae of Chamber of Commerce of the United States of America filed.
25	Aug 30 1983		CIRCULATED.
26	Sep 21 1983		SET FOR ARGUMENT. Monday, November 7, 1983. (4th case)
27	Oct 28 1983	X	Reply brief of petitioner NLRB filed.
28	Nov 7 1983		ARGUED.

12
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10-28-83 P. B.